Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 725.

STANDARD OIL COMPANY, of New Jersey and others,
Appellants,

AGAINST

UNITED STATES OF AMERICA,
Appellee.

BRIEF ON THE LAW FOR APPELLANTS.

Statement of Case.

This is an appeal from the decree of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri rendered in this case on the 20th day of

November, 1909, by the four Circuit Judges of the Eighth Circuit who heard the case under the provisions of the Expedition Act of February 11th, 1903. The decree was adverse to certain of the Defendants and in favor of others, the petition being dismissed as to the latter. This appeal is taken by the Standard Oil Company, of New Jersey, the individual Defendants, and certain of the other Defendants, and this brief is filed on behalf of all the Appellants.

The suit or proceeding is brought under Section 4 of the Act "To protect trade and commerce against unlawful restraints and monopolies" of July 2d, 1890, known as the Sherman Act. It is based upon a petition which was filed in the clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri in November, 1906. Out of seventy-nine defendants the Waters Pierce Oil Company was the only resident of that district, and the only Defendant served with process therein. Contemporaneous with the filing of the petition the Court made an order under Section 5 of the Act for service of process upon all the other Defendants wherever they could be

found. (Vol. A., 173–180). Section 5 is as follows:

> "Whenever it shall appear to the court before which any proceeding under Section 4 of this Act may be pending that the ends of justice require that other parties should be brought before the court the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

It was by service made outside of the Eastern Division of the Eastern District of Missouri under this order that jurisdiction of the person of all the Defendants, excepting the Waters Pierce Oil Company, was acquired.

The Defendants, other than the Waters Pierce Oil Company, after such service at once moved the Court, on an affidavit setting forth the fact that they were not residents of the Eastern Division of the Eastern District of Missouri, and the fact that they had been served with process outside of that District, to vacate the order authorizing such service, and the service of process made thereunder, because made without warrant of law and without jurisdiction. This

motion was heard and denied by the Court. (Vol. A., 227–235; Order, 240; Opinion, 563–569).

Thereupon the same Defendants filed special pleas to the jurisdiction of the Court over them respectively based upon the same facts, which were overruled by the Court. (Vol. A, Pleas, 239–372; Order, 374).

The Defendants thereafter filed answers to the allegations of the petition setting forth acts and transactions subsequent to the date of the Sherman Act, and filed exceptions to the allegations setting forth acts and transactions prior to that date as irrelevant and purely evidenciary. These exceptions were overruled and the Defendants, excepting to the order overruling the exceptions, filed additional answers to the portions of the petition to which the exceptions applied. (Vol. A, Original answers, 378–436, 443–459; Exceptions, 437–443; Order, 470; additional answer, 473–494).

The testimony, evidence and exhibits in the case fill twenty-two volumes, and are Volumes 1 to 22 of the Record. Volumes 1 to 10, inclusive, contain the Petitioner's testimony, evidence aud exhibits constituting its main case;

volumes 11 to 19, inclusive, contain the testimony, evidence and exhibits of the Defendants; volumes 20 and 21 the rebuttal evidence and exhibits of the Petitioner; and volume 22 contains the records and proceedings in the case of the State of Ohio vs. Standard Oil Company of Ohio, 49 Ohio St., 173. Volume A contains the pleadings, decree, opinions, appeal, and the other proceedings in this case. A list of the Defendants' witnesses is given at the end of Volume 17.

Pleadings.

Petition.

The gravamen of the petition is an alleged conspiracy to restrain and monopolize the trade and commerce in petroleum and its products among the States and Territories of the United States, in the District of Columbia, and with foreign nations, in which the individual Defendants John D. Rockefeller, William Rockefeller and Henry M. Flagler have been continuously engaged since the year 1870, and in which they were joined between that year and the year 1882 by the Defendants Henry H. Rogers, John D. Archbold, Oliver H. Payne and Charles M. Pratt.

It is alleged that they entered into this conspiracy and have ever since been engaged in it with each other and with "other persons, corporations, co-partnerships and limited partnerships." The operations of the conspiracy are divided into three periods: one extending from 1870 to 1882; another from 1882 to 1899; and the last from 1899 to the present time. The characteristic ascribed to the first period is the purchase and acquisition of interests in concerns engaged in different branches of the oil business for the purpose of fixing the price of crude and refined oil, limiting their production, and controlling their transportation. The characteristic ascribed to the second period is the formation in 1882 of what is popularly known as the Standard Oil trust by which, as it is alleged, various *independent* firms, corporations, limited partnerships and individuals engaged in the oil business turned over the management of their businesses to nine trustees. The characteristic ascribed to the third period is the vesting of this control and management in the Standard Oil Company of New Jersey as a holding company. The petition then proceeds to treat each of these periods in detail, and it

will be sufficient to summarize its allegations respecting them. (Vol. A, 6–8).

First Period, 1870 to 1882. (Vol. A, 8–12).

This period begins with the organization of the Standard Oil Company of Ohio in the year 1870 with a capital stock of $1,000,000 to take over the businesses of Rockefeller & Andrews, William Rockefeller & Co. and Rockefeller & Co., located at Cleveland, Ohio, and New York City. The Company acquired during the years 1871, 1872 and 1873 all but three or four of the competing refineries in Cleveland, Ohio, the owners of which, so it is alleged, were forced to sell by their inability to compete with it because of the rebates and preferential rates which it obtained from the railroad companies.

The names of a large number of companies, partnerships and individuals engaged in the oil business at various times during this period are given, and it is alleged that they and others formed associations and entered into agreements, combinations and conspiracies to fix the price of crude oil and limit its production, to fix the price of the products of crude oil and limit their production, and to suppress competition and monop-

olize the trade. The only specific instance mentioned is an agreement of December 19th, 1872, between two associations, one known as the Petroleum Producers' Association and the other as the Petroleum Refiners' Association.

It is alleged that the individuals engaged in the conspiracy acquired during this period, by the sale of stock interests in the Standard Oil Company of Ohio, interests in the stocks and business of many of the concerns previously mentioned, and, through these interests and agreements with other refiners, controlled in the latter part of the period more than ninety per cent. of the oil business, and were enabled to do so and to crush out and limit competition by means of rebates and preferential rates obtained from railroads.

Then follows a specification of various contracts with railroad companies which are alleged to have had this effect.

It is further alleged that the parties to the conspiracy acquired during this period in the name of the Standard Oil Company the ownership and control of the principal pipe lines in the oil regions of Pennsylvania connecting with the various railroads reaching those

regions over which oil was transported to the refineries at Philadelphia, New York, Cleveland and other points; and consolidated them first into the American Transfer Company and the United Pipe Lines, and later in the year 1881 into the National Transit Company; and that they were thereby enabled to fix the price of crude oil and the price for its transportation by pipe lines and railroads, resulting in rate discriminations against their competitors.

Second Period, 1882 to 1899. (Vol. A, 21–41.)

The formation of the so-called Standard Oil Trust is set forth, including the trust agreement of January 2d, 1882, and its supplement of January 4th, 1882.

Referring to the corporations and limited partnerships named in the trust agreement it is charged as follows (Vol. A, 31):

> "*And that each and all of said corporations and limited partnerships were at the time of the signing of said agreement, and for a long time prior thereto, so engaged separately in said business as such corporations and limited partnerships; and that by the said trust agreement and the placing of said stock interest in the hands of said trustees,*

as by the said agreement provided, all competition among the said corporations, limited partnerships and individuals was suppressed and destroyed, and the aforesaid trade and commerce among the several states and territories of the United States, the District of Columbia, and with foreign nations, as before described, was restrained and monopolized."

The petition proceeds to allege that the trustees organized, pursuant to the trust agreement, the Standard Oil Company of New Jersey and the Standard Oil Company of New York.

It then alleges as follows (Vol. A., 32):

" Your petitioner further alleges that pursuant to said trust agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and co-partnerships who owned *independent* refineries and other properties employed in the business of refining and transporting and selling oil in and among said various states and territories of the United States as aforesaid, to transfer their property situated in said several states to the respective Standard Oil Companies of said States of New York, New Jersey, Pennsylvania

and Ohio, and other corporations organized or acquired by said trustees from time to time."

The trust certificates were in the following form (Vol. A., 33):

No. Shares $100 each Shares

STANDARD OIL TRUST.

" This is to certify that is entitled to shares *in the equity to the property* held by the trustees of the Standard Oil trust, transferable only on the books of said trustees on surrender of this certificate. This certificate is issued upon condition that the holder or any transferee thereof shall be subject to all the provisions of the agreement creating said trust and of the by-laws adopted in pursuance of said trust agreement as fully as if he had signed the said trust agreement."

It is alleged that, from time to time during this period, other properties belonging to concerns engaged in various branches of the oil business in competition with the trust were acquired, and their property or stocks transferred to corporations owned or controlled by the trustees or to the trustees ; and that between the

years 1888 and 1892 all the various interests represented by the stocks held by the trustees were by transfers of property and stocks vested in twenty companies.

The dissolution of the trust on March 1st, 1892, following upon the decision of the case in the Supreme Court of the State of Ohio entitled State of Ohio *ex rel.* Attorney General vs. Standard Oil Company of Ohio (49 Ohio St., 137), is set forth.

It is alleged that the plan of dissolution provided for issuing to each certificate holder on the surrender of his certificates an assignment of an interest in the stocks held by the trustees in the proportion of the number of his certificates to the total outstanding certificates, and that at this time the outstanding certificates amounted to $97,250,000.

It is alleged that holders of more than a majority of the outstanding certificates surrendered them, obtained their assignments, and converted them into shares of the twenty companies; that the individual defendants so surrendered their certificates; that the mass of certificate holders retained theirs down to the acquisition of the shares of the twenty companies

by the Standard Oil Company of New Jersey in 1899; and that thereby the "individual defendants in this action, who were liquidating trustees, did continue to manage the affairs of all said separate corporations so engaged in said business in the same manner as they had theretofore under and by virtue of the terms of said trust agreement."

Third Period, 1899 to the Present Time.
(A. 41–49).

In January, 1899, the charter of the Standard Oil Company of New Jersey was amended and its capital stock increased from $10,000,000 to $110,000,000, of which the outstanding $10,000,000 were declared to be preferred stock and the remaining $100,000,000 common stock. Of the shares of common stock $97,250,000 were then issued in exchange for the shares of the companies and limited partnerships which had been held by the trustees of the trust (including the preferred stock of the Standard Oil Company of New Jersey) and represented by the $97,250,000 of trust certificates outstanding at the time of

the dissolution in 1892. This, it is charged, was done by the individual Defendants for the purpose of further carrying out the conspiracy and effecting a monopoly of the oil business.

The names of sixty-nine companies are given as the companies now controlled by the Defendants; some of which are described as engaged in refining; others in transporting crude oil through pipe lines; others as owners of tank cars and steamships for the transportation of oil; and others in the marketing of oil throughout the United States.

Then follows a general allegation that from 1882 to 1899 the Standard Oil trust, and, since 1899 the Standard Oil Company and its subsidiary corporations, have refined and sold more than ninety per cent. of the petroleum products manufactured and consumed in the United States and shipped to foreign countries, and have monopolized the commerce, traffic, transportation, refining and sale of oil in the United States and foreign countries, thereby restraining such commerce, regulating the production and supply of the products, and fixing the price thereof.

The remainder of the petition is devoted to a

statement of the various means, in addition to the various combinations before alleged, by which this monopolization has been effected. The headings of the various subdivisions sufficiently indicate for our present purpose what those means as so set forth are, and we give them in their order: (1) agreements with Tidewater Companies (A, 50, 51); (2) contract with Pennsylvania Railroad Company of August 22, 1884 (A, 51, 52); (3) control of pipe lines (A, 53–55); (4) unfair practices against competing pipe lines (A, 55–57); (5) certain contracts in restraint of trade (A, 57–60); (6) railroad discriminations (A, 60–100); (7) coercion of railroads to purchase lubricating oil (A, 100–103); (8) unfair methods of competition, consisting of (*a*) local price cutting; (*b*) reports of competitors' shipments; (*c*) operation of bogus independent companies; and (*d*) payment of rebates on oil prices. (A, 103–107.)

The petition closes with the allegation that by reason of the control of the oil business by the Standard Oil trust and the Standard Oil Company of New Jersey the profits since January 1, 1882, have been exorbitant. (A, 107–110.)

Answers.

We do not deem it necessary to summarize the answers of the various Defendants. It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution tion in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882 or the acquisition of the shares of the defendant Companies by the Standard Oil Company of New Jersey in 1899 was a combination of *independent or competing* concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged or of their purpose, intent or effect.

The Opinion and Decree of the Circuit Court.

To appreciate the full meaning and significance of the rulings of the Circuit Court it should be stated that the evidence conclusively established that all the plants, properties and stocks as they were acquired from the beginning were acquired for a body of common owners, originally the stockholders of the Standard Oil Company of Ohio; and that all the plants and properties created in the expansion and development of the business were created by this body of common owners. This fact of the common ownership is fatal to the theory of the petition that the so-called Standard Oil trust of 1882 and the acquisition of the shares of the various companies by the Standard Oil Company of New Jersey in 1889, were combinations of *independent and separately owned competitive concerns;* and that it was with that fundamental fact of common ownership, which was fully recognized (A., pp. 574, 580), that the Circuit Court had to deal rather than with the theory of the petition the main opinion clearly shows.

The reasoning and conclusions of the main opinion are best shown by a series of quotations.

(1) "**The exchange of the stock or shares in the ownership of competitive corporations engaged in interstate or international commerce for stock or shares in the ownership of a single corporation, the necessary effect of which is a direct and substantial restriction of competition in that commerce, constitutes a combination in restraint of commerce among the states or with foreign nations that is declared illegal by this law**" (A. 573).

(2) "**Do the stockholding trust of 1899 and its continuing operation constitute an illegal restraint of interstate or international commerce in violation of the Anti-Trust Act of 1890?**" (A. 577, 578). **(It is the acquisition of the shares of the various companies by the Standard Oil Company of New Jersey in 1899 that the Court describes as a stockholding trust.)**

(3) "**It is true, with negligible exceptions, that the stockholders of the defendant corporations were the joint equitable owners of them from 1879, or from their subsequent organizations respectively, until July 1, 1899, but the great majority of these stockholders never held the legal title to their stock except during**

a few months between 1896 and 1900. In 1899 the stockholders of the principal company were the stockholders of the subsidiary companies and each stockholder held the same share or interest in each of the corporations (A., 580).

(4) "The combination formed by that transfer and its power to restrict competition were less liable to be destroyed, more reliable and permanent than those springing from the joint ownership by three thousand stockholders of each corporation. There is much more probability that corporations potentially competitive will separate and compete when each of their stockholders has a separate certificate of his shares of stock in each corporation which he is free to sell than when a majority of the stock of each of the corporations is held by a single corporation which has the power to vote the stock and to operate them" (A., 582, 583).

(5) "Because the power to restrict competition in interstate commerce granted to the Standard Oil Company of New Jersey by the transfer to it of the stock of the nineteen companies and of the authority to manage and operate them and the other corporations which they controlled was the absolute power to prevent competition among any of these corporations, because this

power was greater, more easily exercised, more effective and more durable than that which the three thousand stockholders of these corporations previously had, because many of these corporations were potentially competitive and were engaged in interstate commerce, and the necessary effect of the transfer of the stock of the nineteen companies to the holding company was, under the decision in the case of the Northern Securities Company, a direct and substantial restriction of that commerce, that transfer and the operation of the companies under it constituted a combination or conspiracy in restraint of interstate and international commerce in violation of the anti-trust act of July 2, 1890" (A., p. 583).

(6) "But in the case under consideration the combination and conspiracy in restraint of trade and its continued execution, which have been found to exist, constitute illegal means by which the conspiring defendants combined, and still combine and conspire, to monopolize a part of interstate and international commerce, and by which they have secured an unlawful monopoly of a substantial part of it, and this conspiracy constitutes as clear and complete a violation of the second as of the first section of the act. Upon the ground that the defendants

have thus violated, and are violating, the second section of the act as fully as upon the ground that they have violated its first section, the decree in favor of the government must be and is based" (A, p. 585).

Decree.

(1) The acquisition of the shares of the various Companies by the Standard Oil Company of New Jersey in 1899 is decreed to be a combination or conspiracy in restraint of trade and commerce which the Sherman Act declares to be illegal.

(2) Certain of the Defendants are decreed to have entered into, and become parties to, this combination, and by its means to have combined and conspired to monopolize, have monopolized, and are continuing to monopolize, a substantial part of interstate and foreign commerce in violation of Section 2 of the Sherman Act.

(3) The Standard Oil Company of New Jersey is enjoined from voting any of the stocks of the subsidiary Companies or exercising any control over their acts; and the Companies are enjoined

from declaring or paying any dividends to it, and from permitting it to vote any of their stocks, or to direct their policies, or to exercise any control over their corporate acts.

(4) The Defendants specified are enjoined from continuing the combination adjudged to be illegal, and from entering into any like combination or conspiracy, the effect of which will be to restrain commerce in petroleum or its products and to prolong the unlawful monopoly, by the devices specified in Section 6 of the decree or by any similar device.

(5) The same Defendants are enjoined from engaging or continuing in commerce among the states or in the territories of the United States until the discontinuance of the operation of such illegal combination.

Specification of Errors.

It is respectfully submitted that the Court erred in the following among other particulars:

(1.) In not vacating the order authorizing and directing the service of process upon the Defendants, excepting the Waters Pierce Oil Com-

pany, outside of the Eastern Division of the Eastern District of Missouri, and the service of process on them made pursuant thereto, and in overruling the pleas of the Appellants to the jurisdiction of the Court with respect to them.

(2) In holding and decreeing that the vesting of the shares of the various Standard Oil companies in the Standard Oil Company of New Jersey in the year 1899 was a combination or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act.

(3) In holding and decreeing that the Appellants, or any of them, have monopolized, or attempted to monopolize, a substantial part of interstate and foreign commerce in petroleum and its products by means of such illegal combination in violation of Section 2 of the Sherman Act.

(4) In holding and decreeing that the acquisition in 1899 of the stocks of manufacturing companies located in various States by the Standard Oil Company of New Jersey was a violation of the Sherman Act and illegal; and in enjoining it from voting such stocks, and such companies from declaring and paying dividends to it.

(5) In similarly holding and decreeing with respect to certain of the Appellants whose sole

business is that of mining for crude petroleum in various States.

(6) In similarly holding and decreeing with respect to certain of the Appellants which the common owners of the Standard Oil properties themselves organized for the expansion and development of the common business.

(7) In similarly holding and decreeing with respect to certain of the Appellants organized or acquired by the Standard Oil Company of New Jersey since 1899 for the expansion and development of its business.

(8) In similarly holding and decreeing with respect to certain Appellants organized by the common owners of the Standard Oil properties to build or operate pipe lines as adjuncts of the various refineries for their supply of crude oil for manufacturing purposes.

(9) In enjoining the Appellants with respect to the future use and disposition of their properties and the conduct of their business either as particularly specified in the decree or as covered by the general phrase "by any similar device."

(10) In enjoining the Appellants from engaging and continuing in interstate commerce whilst the Standard Oil Company of New

Jersey continues to own and hold the stocks of the other Appellants.

The analysis of the testimony, evidence and exhibits, and the statement of the facts deemed to be established thereby, are found in Volume II. of this brief.

POINTS.

(I.) The plants and properties of the Standard Companies have always been in a common ownership since their acquisition or creation.

(II.) The Sherman Act has no application to the acquisition by the Standard Oil Company of New Jersey of the stocks of manufacturing and mining or producing corporations.

(III.) The contracts, combinations and conspiracies of Section 1 of the Act are contracts, combinations and conspiracies which restrict the freedom of the parties or strangers in the conduct of their business.

(IV.) The acquisition of the stocks of the subsidiary companies by the Standard Oil Company of New Jersey in 1899 was not such a combination or conspiracy in restraint of trade.

(V.) Monopolizing within the second section of the act is the exclusion of others from a trade by illegal means.

(VI.) The Standard Oil Company of New Jersey was not monopolizing, or attempting to monopolize, or combining with anyone else, to monopolize when this proceeding was instituted.

(VII.) The ownership of the pipe line systems has not been a means of monopolizing.

(VIII.) The decree erroneously includes and operates upon several of the appellant Companies.

(IX.) The sixth section of the decree is unwarranted and impracticable in various of its provisions.

(X.) The Circuit Court had no jurisdiction over the Appellants.

BRIEF OF ARGUMENT.

I.

In 1899 when the stocks of the various companies were transferred to the Standard Oil Company of New Jersey, as in July, 1890, when the Sherman Act was enacted, and as had been the case since 1870 when the Standard Oil Company of Ohio was organized, all the properties and plants and interests in properties and plants, or the stocks representing them, which had been acquired were acquired by a body of common owners for the purposes of a common business, and had always been held by them in the same common ownership, legal or beneficial; and all the enlargements of existing plants and establishments of new plants during the entire period since 1870 were part and parcel of the same common ownership and common undertaking.

(1) The Standard Oil Company of Ohio, the original company, was organized in 1870 by the members of the firm of Rockefeller, Andrews and Flagler to take over the refine-

ries and business of the firm. It was owned by young, able, vigorous and enterprising men; and the plants it took over were of the best type with a very considerable output, fully ten per cent. of the total output of the entire trade. Notwithstanding the hazardous character of the business, and the demoralization which then existed in every branch of the industry through its speculative and excessive exploitation during the sixties, the men who owned and managed the Company had faith in the business and the courage of their faith. They conducted its business with a keen eye to efficiency, economy and the progress of the art; they were in good credit and could command ample capital; they were diligent, farsighted and ambitious; and they felt that under the conditions which existed expansion with its economic advantages was necessary as a measure of self-preservation. In the latter part of 1871 and during the year 1872 the Company purchased a number of refineries in Cleveland. The purchases were made for cash or with the stock of the Company as the vendors might elect, its capital stock having been increased from $1,000,000

to $2,500,000. The transactions were entirely voluntary and free from coercion. Some of the vendors were glad to convert their investments into cash because of the prevailing conditions, and others who took stock in payment lost their confidence and sold it. During the period between 1872 and 1879 refineries were acquired at the different refining points, viz.: Titusville, Franklin, Pittsburgh, and other places in the oil regions of Pennsylvania; Philadelphia, Baltimore, New York, Boston and Portland on the Atlantic Seaboard; Parkersburg, West Virginia, and Louisville, Kentucky. These purchases were separate, distinct and independent transactions occurring at different times over this period of seven years. Each was the result of a negotiation between the particular vendor and vendee. There was no combination between the several vendors or any relation of any kind between the different transactions. Every feature is lacking of a combined mass of transfers in which the consummation of each was to be dependent upon the consummation of all. There was no scheme for the acquisitions as a whole; there was no coercion; and there is not a particle of evidence that any of the vendors were in

any way restricted from engaging, or employing their capital, in the same business in the future.

There were also during this period acquisitions of various small gathering systems of pipe lines in the State of Pennsylvania, or of interests in such systems; and of interests in a few marketing concerns in different parts of the country.

The Cleveland refineries were conveyed to the Standard Oil Company of Ohio. All the other properties, or the stocks representing them, were acquired for the stockholders of that Company. The earnings of the Company over and above a moderate annual dividend, representing the margin between a legitimate manufacturing profit in a business of that character and such a dividend, instead of being paid to the stockholders were used to acquire these properties for their benefit. When physical properties were acquired they were conveyed to individuals in their behalf. When stocks of corporations were acquired, or stocks of new companies organized to take over properties were subscribed and paid for, they were taken in the names of individuals for the same purpose. The title to the properties and stocks in this common ownership was held in this manner down to April, 1879. Had the cor-

porate powers of the Company authorized it to acquire the stocks of other companies it could itself have taken title to these stocks.

(2) On April 8th, 1879, by an instrument executed at that time these properties and stocks were transferred to M. K. Keith, G. F. Chester and G. H. Vilas as trustees for the parties named in the instrument, *who were the stockholders of the Standard Oil Company of Ohio*, to hold, control and manage them for the exclusive use and benefit of the beneficiaries, and to divide and distribute them between the beneficiaries as soon as it could conveniently be done, in the proportion in which each owned the stock of the Company (Ex. 257, Vol. 19, p. 618).

(3) The next step was the constitution of the so-called Standard Oil trust of January, 1882. The parties to the agreement executed at that time are embraced in three classes. The second class is made up of certain named individuals, who were the stockholders of the Standard Oil Company of Ohio and the owners of the stocks of the corporations named in the first class in their entirety, and of a part of the stocks of the corporations named in the third class, and,

with a few exceptions, of the major part. It was not an agreement bringing together independent competing concerns separately owned, but one between common owners of various stocks and properties vesting the legal title thereof in trustees for the purposes expressed in the agreement. It did not affect the relations of the properties to each other or change the actual beneficial ownership. After the agreement the same ownership interests in all the properties were represented by trustees' certificates as they had previously been represented by the shares of the Standard Oil Company of Ohio and the Vilas, Keith and Chester trust. It was a trust in the technical sense of the term created by common owners, and not a combination of separately and independently owned properties and plants.

(4) The years between 1879 and 1882 mark the end of the period of substantial acquisitions. The acquisitions after that time were of minor importance and have no material bearing on the questions involved in this case. The structure of the organization was not affected by them one way or the other, and its history would have been the same without them as with them. The

main process after that time was one of integration to secure efficiency and economy. Instances of this process were the organization in 1882 of the Standard Oil Companies of New Jersey and New York in which the plants on the Atlantic Seaboard were vested, largely by actual conveyance. Other refining plants were concentrated in the Atlantic Refining Company which had been acquired in 1874. The Standard Oil Company of Kentucky was organized as an extensive marketing company. The National Transit Company had been organized as the repository of the pipe line interests.

(5) From this time on the expansion was internal as new oil fields were discovered, new products perfected, and the use of the products increased with the increase of population and the gradual establishment of markets all over this country and the world. Existing refineries were enlarged and new refineries were built in favorable locations with reference to the new oil fields and the distribution of the products. For instance, after the discovery of the Lima field in Ohio and Indiana the Standard Oil Company of Indiana and the Solar Refining Company were organized by the trustees to refine the oil

from that field at Whiting, Indiana, and Lima Ohio. As each new field was discovered pipe lines were built to gather the oil as it flowed from the wells and convey it first to storage tanks and then by trunk lines to the refineries. The development along these lines after 1882, necessitating the formation and capitalization of many different corporations, was the result of internal growth and expansion and not of combination or acquisition.

(6) In 1892 the so-called Standard Oil trust was dissolved as a result of the decision of the Ohio Supreme Court in the case of the State of Ohio vs. The Standard Oil Company (49 Ohio St., 137) compelling the withdrawal of the Standard Oil Company of Ohio. No change of actual ownership followed from this step. The real owners of the property before the dissolution were the certificate holders. The method of dissolution was the assignment by the trustees to the certificate holders of their proportionate shares of the stocks held by the trustees. A part of the certificate holders at once surrendered their certificates, received assignments of their respective proportions of the shares of each of the com-

panies, and converted them into those shares. The shares of those who did not surrender their certificates or convert their assignments continued to be held for them by the trustees. There was no separation of the ownership of the shares in the different companies either by those who surrendered their certificates and converted their assignments, or those who continued to hold them. As shares of separate companies they were unmarketable because each company was simply a part or member of an organism, though a distinct legal entity with its own officers to manage its affairs. Those who had exchanged their assignments from the trustees for shares continued to hold their shares in a mass just as the shares of those who did not surrender their certificates or assignments continued to be held by the trustees for them in a mass. There was no change in the conduct of the business as a unit. The function in the business as a whole, say of the Standard Oil Company of New York, continued just the same after the dissolution as before; and the same is true of all the other companies. Every owner, whether in possession of shares of the respective companies or in possession of

trustees' certificates, was after, as before, the dissolution the owner of the same proportionate part of each of the companies and properties.

(7) This was the situation in 1899 when the Standard Oil Company of New Jersey increased its capital shares and acquired the stocks of the other companies. All the owners then owned precisely the same proportion of the shares of the Standard Oil Company of New Jersey that they did of the shares of each of the other companies, many of which they had themselves created. They transferred all their shares in the various companies to the Standard Oil Company of New Jersey, and received for the proportion of the shares which had been represented by a trust certificate a share of its common stock. In other words the owners of the shares of these various companies, all of which were owned by the same owners in the same proportions, transferred their shares to one of the companies in the common ownership, and received for them its shares in precisely the same proportion. The legal title to the shares acquired passed to the Standard Oil Company of New Jersey; but it acquired and held them

for its stockholders. There was no change in the ultimate beneficial ownership. After the transfer the stockholders of the Standard Oil Company of New Jersey were the beneficial owners of all these properties of which they had before been the beneficial owners as holders of trustees' certificates. The business of the companies and their relations to each other were absolutely unchanged. There was, therefore, in this step no combination of separately and independently owned concerns.

This common ownership is the fundamentally distinguishing feature of this case with respect to the Sherman Act in so far as it has any application.

II.

The Sherman Act has no application to the transfer to, or acquisition by, the Standard Oil Company of New Jersey of the stocks of the various manufacturing and producing corporations, for the reason that such transfer and acquisition were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate and foreign commerce, nor within the power of Congress to regulate interstate and foreign commerce.

(1) The corporations whose stocks were acquired by the Standard Oil Company of New Jersey may be classified as follows:

(*a*) Manufacturing companies: Standard Oil Company of Ohio, Standard Oil Company of New York, Standard Oil Company of Indiana, Standard Oil Company of California, Standard Oil Company of Kansas, Atlantic Refining Company, Vacuum Oil Company, Galena Signal Oil Company, Solar Refining Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, and Swan & Finch Company.

(*b*) Producing companies: Sonth Penn Oil Company and Washington Oil Company.

(*c*) Mixed companies: Prairie Oil & Gas Company which produces and buys oils in the Mid-continent field, and transports its own oil, so produced and bought, by its own private pipe lines to various points; and the Ohio Oil Company which produces oil in the Lima field and produces and buys oil in the Illinois field, and transports its own oil, so produced and bought, by its own private pipe lines to various points.

(*d*) Marketing companies: Standard Oil Company of Kentucky, Continental Oil Company, Standard Oil Company of Iowa (now wound up), Waters Pierce Oil Company, Anglo-American Oil Company (in Great Britain), and Colonial Oil Company (in foreign countries).

(*e*) Pipe line companies: National Transit Company, New York Transit Company, Northern Pipe Line Company, Southern Pipe Line Company, Southwest Pennsylvania Pipe Lines, Buckeye Pipe Line Company, Cumberland Pipe Line Company, Crescent Pipe Line Company, Eureka Pipe Line Company and Indiana Pipe Line Company.

(*f*) Tank car company: Union Tank Line Company.

The business of the Standard Oil organization is the business of manufacturing out of crude petroleum by various processes a great variety of products. The manufacturing companies are those above enumerated as such, and their plants are located geographically with reference to existing oil fields and the economical distribution of the product. The properties and plants of the other corporations are purely accessorial to the business of manufacturing. The production of the producing companies is only between ten or eleven per cent. of the total production of the United States; but it is a guarantee of a certain supply of the raw material for the refineries in all contingencies. The oil-buying companies buy a part of the supply of the refineries. The pipe lines are the arterial system which collects the oil at the wells and supplies it to the refineries. They are a necessary adjunct to refining on a large scale. The marketing companies supplement the selling facilities of the various refining companies in the distribution of their products in this and foreign countries. The car company provides the special kind of tank car used in the transportation of oil. Thus the main cor-

porations are manufacturing corporations, and the question is whether their acquisition was a transaction in interstate commerce or subject to the Sherman Act or the regulative power of Congress. If they are not they, and the producing companies which are in the same category, should at any rate be eliminated from the operation of the decree in this case; and that would leave only the question whether the acquisition of the other accessorial corporations, was, as to them, a combination in restraint of interstate trade within the first section of the Act.

(2) The case of U. S. vs. Knight (156 U. S., 1), is a conclusive authority that the acquisition of the stocks of the manufacturing and producing corporations is not a transaction subject to national control or regulation or within the Sherman Act.

We deem it unnecessary to review that case in detail or examine the later decisions to show that its rulings have not been limited or modified. That work has been so exhaustively done in recent briefs and arguments before this Court that it would be inexcusable to again travel over the same ground. The case rests on the fundamental distinction between production and com-

merce; between manufacturing and mining and the sale of their products; between the acquisition of manufacturing and mining properties and commercial transactions; between the province of the State and the province of the Nation. Manufacturing and mining, and the intrastate trade in the products of manufacturing and mining, are within the province of State regulation and control. It is only when the products pass into interstate or foreign commerce that they enter the sphere of National regulation and control and become subject to the Sherman Act. The acquisition of a manufacturing plant concerns manufacturing directly and interstate commerce indirectly, and is not a transaction in interstate commerce; and it is only transactions in interstate commerce that are the subject matter of national regulation, and particular classes of those transactions that are within the Sherman Act. All this is true although manufacturing and commerce are intimately connected; because though intimately connected they are intrinsically different, and the difference is so real and substantial as to place one under State and the other under National control.

These fundamental distinctions were thoroughly defined and settled in our jurisprudence

before the Knight case, and what it did was to apply them to the operation of the Sherman Act as Judge JACKSON had done before in his luminous opinion in the case of *In Re* Greene, 52 Fed., 104, written in the period of the enactment of the Sherman Act when all the conditions surrounding its enactment were vividly in the minds of men. The transaction questioned in the Knight case was the acquisition of four refineries in Philadelphia, producing thirty-three per cent. of the total production of sugar refined in the United States, by the American Sugar Refining Company, which then produced sixty-five per cent., thus giving it a total of ninety-eight per cent. All the refineries obtained their raw material from other states and countries. Their product was sold all over the United States and "*the object in purchasing the Philadelphia refineries was to obtain a greater influenee or more perfect control over the business of refining and selling sugar in this country.*" The acquisition was effected through the purchase of the shares of stock of the Pennsylvania companies, which were paid for with the stock of the American Company in agreed proportions. This is the transaction which was held not to be within the

commercial power of Congress or, consequently, the Sherman Act. The principle of the decision and the facts to which it was applied are so precise and definite that there is no real difficulty in its application. That it has been apparently misunderstood is due to the failure to observe the distinction between production and commerce, and between transactions directly affecting manufacture and only indirectly or incidentally affecting commerce, and transactions in interstate commerce.

The acquisition of any number of competing refineries, even if it could be called a combination, is fundamentally distinguishable from a combination which concerns and operates upon the conduct of trade or commerce in the articles produced. The case of Addyston Pipe & Foundry Company vs. United States, 175 U. S., 211, is a perfect illustration of a combination dealing with and operating directly upon the sale of a commercial article, or upon the trade in that article, as distinguished from its production; just as the Knight case is a perfect illustration of a transaction dealing with and directly operating upon production as distinguished from the trade in the article produced.

(3) The Standard Oil Company of New Jersey, a refining company, acquired in 1899 the refineries

of the various manufacturing Companies above enumerated by acquiring the stocks of the Companies and paying for them with its own stock just as the stocks of the sugar refineries were acquired. The refineries obtained their raw materials in part from other States just as the sugar refineries did. Their products after completion entered into domestic and interstate trade, just as did the products of the sugar refineries. That transaction and the transaction involved in the Knight case cannot be differentiated. One cannot be within the commercial power of Congress and the other not; one cannot be subject to the Sherman Act and the other not. If it be said that at the same time the stocks of corporations engaged in transporting oil and of corporations engaged in marketing oil in different States were acquired those transactions furnish no ground for bringing other transactions outside of the Act and the commercial power within them. If it were conceded that the acquisitions of the transportation and marketing companies was within the Act because they directly affected interstate commerce or instrumentalities of interstate commerce, the illegality of those transactions may not be extended to other acquisitions not within the Act. It is not permis-

sible to enlarge the operation of the commercial power or of the Act by bringing within them on any such theory matters and transactions entirely outside of them. If the Standard Oil Company of New Jersey had acquired only the refining and producing companies the application of the Knight case would be conclusive. If the acquisition of other companies was within the condemnation of the Act the only violation of the Act is their acquisition, and its remedies are only available as to them.

We are not considering the latter companies under this Point. It is not necessary for us to take a position as to whether their acquisition was within or without the principle of the Knight case. The manufacturing and producing companies are clearly within its principle, and they are severable in their existence, identity and operations from the other companies; and the acquisition of their stocks is severable from the acquisition of the stocks of the other companies. If there was anything illegal in the acquisition of those other companies by the Standard Oil Company of New Jersey, which we deny, that illegality would only justify a proper decree as to them.

III.

The contracts, combinations and conspiracies of Section 1 of the Sherman Act are contracts and combinations which contractually restrict the freedom of one or more of the parties to them in the conduct of his or their trade, and combinations or conspiracies which restrict the freedom of others than the parties to them in the conduct of their business, when these restrictions directly affect interstate or foreign trade. Purchases or acquisitions of property are not in any sense such contracts, combinations or conspiracies.

(1) Section 1 of the Act is as follows :

> " 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year or by both said punishments, in the discretion of the Court."

This section says nothing about competition, monopoly, tendency to monopoly, monopoliz-

ing, intent to monopolize, control of the market or of prices. It deals with specific kind of acts, transactions and relations and declares them to be illegal. They are acts, transactions and relations in restraint of trade. If a contract, combination or conspiracy is in restraint of trade it is denounced as illegal. It is in restraint of trade if it has a certain direct operation, and the vital question always is whether it has that operation. What then is the characteristic and controlling element which distinguishes a contract, combination or conspiracy in restraint of trade from other kinds of contracts, combinations and conspiracies? That is not a question difficult to determine, because a contract, combination or conspiracy in restraint of trade had been known to the law and the subject of judicial definition long before the enactment of the Act. That characteristic and controlling element is the total or partial restriction of the freedom of the trader in the conduct of his business in his own way, by contract in the case of pure contracts in restraint of trade and contractual combinations, or by acts in the case of combinations in the nature of conspiracies. By contractual combinations we

mean combinations which work through executory agreements.

(*a*) Contracts in restraint of trade fill a large space in the jurisprudence of the last two hundred years. They are "contracts with a stranger to the contractor's business (although in some cases carrying on a similar one) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would" (HOLMES, J., in Northern Securities case, 193 U. S., 404). It is said in Pollock on Contracts, 7th Ed., page 352, that "the original principle is that a man ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion and in his own way." Every case of this kind in the books is one involving a covenant or condition restricting the freedom of the individual in the pursuit of his trade or in the use of property for trade purposes.

The main grounds for the doctrine that such contracts are invalid, in the sense of being unenforcible by the courts, are, as stated in Oregon Steam Navigation Co. vs. Windsor, 20 Wall., page 68, "the injury to the public by being deprived of the restricted party's industry" and

" the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family." These reasons are stated more fully in Alger vs. Thacker, 19 Pick., page 54, where it is said :

> **" 1. Such contracts injure the parties making them because they diminish their means of procuring livelihoods and competency for their families. They tempt improvident persons for the sake of present gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.**
>
> **2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.**
>
> **3. They discourage industry and enterprise and diminish the products of ingenuity and skill.**
>
> **4. They prevent competition and enhance prices.**
>
> **5. They expose the public to all the evils of monopoly."**

Thus it is in the reasons for the rule that we find a reference to competition and monopoly and not in the constituent elements of the contract. The relation of restrictions on the freedom of the trader to pursue his trade in his own

way, constituting restraint of trade, to competition, when there is any, is the relation of cause and effect. There may be interference with competition without any restriction of the freedom of any individual in carrying on his business; but in such cases there is no restraint of trade in a legal sense. No contract or contractual relation is in restraint of trade unless this element of restriction is present as the essential matter.

(*b*) This principle is equally applicable to combinations in restraint of trade. They present the case of two or more persons engaged in a trade entering into an agreement whereby each party is restricted in his freedom in carrying on his business in his own way, usually with reference to the amount of his production, or prices, or territory, or the wages of labor. Hilton vs. Eckersley (6 El. & Bl., p. 47) is a leading case in England on this subject. It was an action to enforce a bond signed by eighteen Lancashire cotton spinners binding them severally to carry on their businesses with respect to the wages they would pay, hours of labor, and other matters, according to the regulations of the majority. It was held by the Court of Exchequer Chamber

that it was unenforcible because in restraint of trade, and the grounds of the decision are stated as follows (*id.*, p. 74, 75):

> "The question is whether this is a bond in restraint of trade; and we think it is so. Prima facie it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any manner regulated or restrained his mode of doing this the law must be obeyed. But no power short of the general law ought to restrain his free discretion. Now here the obligors to this bond have clearly put themselves into a situation of restraint. 1st: Each of them is prevented from paying any amount of wages except such as the majority may fix, whatever may be the circumstances of the work to be done and his own opinion thereon. Secondly, they can only employ persons for such times and periods as the majority may fix on, however much the minority may deem it for their own interest to do otherwise. The hours of work, the suspending of work partially or altogether, the discipline and management of their establishments is to be regulated by others forming a majority and taken from every individual member. And all this for a fixed period of twelve months. All these are surely regulations restraining each man's power of carrying on his trade according to his discretion for his own best advantage and, therefore, are restraints on trade not capa-

ble of being legally enforced. We do not mean to say that they are illegal in the sense of being criminal and punishable. The case does not require us and we think we ought not to express any opinion on that point".

The numerous common law cases so frequently cited in this connection are all illustrations of this principle. A few of them are Morris Run Coal Co. vs. Barclay Coal Co. (68 Pa. St., 173); Salt Co. vs. Guthrie (35 Ohio St., 666); Arnot vs. Pittston and Elmira Coal Co. (68 N. Y., 558); Craft vs. McConoughy (79 Ill., 346); India Bagging Association vs. Kock (14 La. Ann., 168); Vulcan Powder Co. vs. Hercules Powder Co. (96 Cal., 510); Oil Co. vs. Adoue (83 Tex., 650); and Chapin vs. Brown (83 Ia., 156).

In all of these cases there was a combination of independent manufacturers or dealers in the form of an executory agreement regulating prices, production or the conduct of the business of each in other particulars. They were combinations in restraint of trade because the freedom of each to conduct his own business with respect only to his own interests and judgment was restrained and restricted. As in the case of pure

contracts in restraint of trade the same considerations were assigned as the reason for the rule condemning them, viz., that the tendency of such restrictions upon the freedom of traders was to prevent competition and favor monopoly.

Another illustration of such combinations is the so-called industrial trust which appeared in the eighties. Their original form was a combination of separately-owned concerns committing the management of the affairs of their respective businesses to a small board of trustees who regulated the volume of production, prices, and territorial operations of each concern. Each of the separate concerns was thereby deprived of its power to conduct its affairs in its own way, thus presenting the essential element or condition which constitutes restraint of trade. Sometimes the managing and controlling body was a small group of men denominated trustees as in the case of the Sugar trust (People *ex rel.* North River Sugar Refining Company, 54 Hun, 354; s. c., 121 N. Y., 582), and the so-called Whiskey trust (State vs. Nebraska Distilling Co., 29 Neb., 700); sometimes the regulating body was a corporation with appropriate powers as illustrated in Pocahontas

Coke Co. vs. Powhattan Coal & Coke Co. (60 W. Va., 508); and other devices were employed to secure this centralization of control of separately owned concerns. In all of these combinations there was present the vital, fundamental and controlling fact of restriction upon the freedom of a trader in the conduct of his business constituting restraint of trade. Without the presence of that controlling element there is not a combination in restraint of trade whether it is in the form of a so-called industrial trust or any other form. If that element be present it is a combination in restraint of trade whether small or large, and whatever its degree of interference with competition, and whether it tends towards monopoly or not.

(*c*) A conspiracy in restraint of trade is a combination of two or more to deprive others than its members of their freedom in conducting their business in their own way by acts having that effect. A combination to boycott is a sufficient illustration.

It need only be added that at common law contracts and contractual combinations in restraint of trade were only unlawful in the sense of being unenforcible by the courts; whilst conspiracies were tortious and sometimes criminal.

(2) This was the state of the law when the Sherman Act was enacted. Every phrase that the first section contains had a distinct legal meaning and significance. A contract in restraint of trade, a combination in restraint of trade, whether in the form of trust or otherwise, a conspiracy in restraint of trade, was each a definite legal conception or entity with its distinct essential element. That element was the restriction of the freedom of a trader in the conduct of his business in his own way. The purpose of that section was to legislate respecting such contracts, combinations and conspiracies in the sphere of interstate and foreign commerce. It provided no new definition of restraint of trade. It did not seek to enlarge the category of contracts, combinations and conspiracies in restraint of trade by bringing within it transactions and relations which had never belonged to it and which lacked its fundamental characteristic and element. It contains no language indicating such an intention or effort. We take the statute as it reads and give it its full meaning. The test, therefore, as to its application to any particular set of facts is whether they show a contract, combination or conspiracy

restricting the freedom of a trader in the conduct of his trade. Every case that has been decided by this Court under Section 1 of the Act responds to this test.

U. S. vs. Trans-Missouri Association (166 U. S., 290), U. S. vs. Joint Traffic Association (171 U. S., 505), Addyston Pipe & Steel Co. vs. U. S. (175 U. S., 211), Montague vs. Lowry (193 U. S., 38), Swift vs. U. S. (196 U. S., 375), Loewe vs. Lawlor (208 U. S., 274), and Continental Wall Paper Co. vs. Voight & Sons (212 U. S., 227) all involved combinations, either expressly by the terms of the agreements constituting them restricting the freedom of each of the members in the conduct of his or its business, or in the nature of conspiracies to restrict the freedom of others than their members in the conduct of their business. In the railroad cases each member of the combination was restricted in its rate making function. The typical case of all is the Addyston Pipe case, the agreement in which very specifically restricted the freedom of each of the parties to it in the conduct of his businesses in various particulars. Loewe vs. Lawlor is a typical case of a combination in the nature of a conspiracy to restrict a trader by means

among others of a boycott. The Northern Securities case, 193 U. S., 197, regarding it as a combination, which was the basis of the decision of this Court, was in its final analysis a combination which, through the device adopted, restricted the freedom of the stockholders of two independent railroad companies in the separate and independent control and management of their respective companies. We feel warranted, therefore, in saying that the decisions of this Court under the first section of the Act are predicated on the restriction of the freedom of the trader in the conduct of his trade as the essential condition which determines whether a contract, combination or conspiracy is in restraint of trade.

(3) Purchases and acquisitions of property are not contracts, combinations or conspiracies in restraint of trade. The freedom of a trader is not restricted by a sale of his property and business. The effect of the transaction is that his property and business pass to another who is free to do with them as he sees fit, and he remains free to employ his energies and capital as he sees fit. The essential element of restraint of trade is entirely absent. There is no resulting loss

of freedom of action. The vice of restraint of trade is that it is a limitation of free action; and that is not a consequence of a change of ownership. The rule of public policy is freedom in the acquisition and disposition of property and the conduct of one's trade; and the rule which condemns restraints and restrictions of the freedom of the individual in the conduct of his trade is a corollary from that wider rule of freedom.

Acquisitions by purchase or exchange are *executed* transactions. When completed title has passed and one owner has taken the place of another. If it is a purchase of the property or business of a competitor there is an elimination of competition so far as that property or business is concerned, but only so far. This mode of eliminating competition could not be prohibited in any way except by limiting the extent to which a man may acquire property of a particular nature or limiting his power to deal with and dispose of his own possessions. It has never been condemned by the law. The conditions of free and unfettered competition, following the natural course of business, are where each proprietor acts in obedience to his own views of his

own interests, without any obligation arising out of *agreement* to consult with or conform to the views of other proprietors. They include no regulation of the amount of property or interest of any proprietor or as to the number of proprietors whose interests are united in common ownership.

On the other hand, contracts, combinations and conspiracies are *executory* agreements in their nature and operation. An agreement cannot restrain trade unless it is executory. It must be something which binds one party to another. Agreements of this character are found only among separate and independent owners who remain separate and independent *after* the agreement is made.

If a dozen different persons are engaged in trade and one of them desires to break up competition between them, and procures the execution by them of an agreement that they will not in the future sell for less than a fixed price, or less than a price to be fixed by designated persons, or that they will stock their profits and divide in certain designated proportions, such agreement is in restraint of trade and does prevent competition. It has a binding force from

day to day throughout the period of its continuance. *It* is the *binding*, *restraining* thing. Proprietorship is not changed, but by force of the agreement each party to it exercises a control over the business of all the others. They are not at liberty to conduct their business in conformity to their own views as prompted by exclusive self-interest, but are bound by a ligament created by the agreement to conduct their business in accordance therewith.

It is this form of combination of capital and interest which the law generally discountenances. It is in hostility to that *natural* control of property and business which exists when each man is controlling his own property and business in accordance with his own will and pleasure, subject only to the maxim "*sic utere tuo ut alienum non laedas.*"

Purchasing and selling may be carried on without restraint. It is one of the necessary incidents of property; and it is no objection that the exercise of the privilege may have the effect of eliminating competition or even that it was resorted to for that purpose. But *agreements* between competing parties who remain distinct proprietors to destroy or remove competition are open to legal objection.

(4) The classification of transactions in the first section of the Act is far from co-extensive with the business transactions of men which affect competition in one way or another. There is a wide area of human conduct in the domain of trade which the Act does not touch at all. In enacting the law Congress was dealing, so far as the first section is concerned, only with certain kinds or classes of transactions and putting the ban of the law upon them. All other acts, transactions and relations are outside of its pale however they may affect competition or trade. It would have been very easy, if it had been the intent of Congress to prohibit acquisitions of property which affect competition in inter-state commerce, to say so explicitly. That it failed to do so is of controlling significance considering how common a transaction it is for acquisitions to affect competition even on a large scale. Had it done so it would have raised interesting constitutional questions as the right to freely buy and sell property is a fundamental civil right guarded and protected by the constitutional guarantees, both National and State, and not lightly to be emasculated or impaired; and that is in and of itself a sufficient reason

for confining the Act to the well settled legal import of its phraseology.

(5) It has recently been contended before this Court that if two competing wholesale grocery concerns engaged in interstate commerce are bought, and their competition is thereby terminated, the transaction is within the Act, *if the facts show that it was intended to restrain commerce or that would be its necessary effect.* But there is no element of restraint of trade in such a transaction because neither vendor nor vendee is restrained. A contract to buy out a competing business or to buy two competing businesses does not and cannot possibly restrain anybody or anything, and has never been held to be restraint of trade or bad on any ground. If it were held to be illegal on any such ground it would be a startling and revolutionary addition to jurisprudence. If the absorption by purchase of the trade of two men by one of them or by another man is restraint of trade this branch of jurisprudence will have to be rewritten.

The contention is not helped by the reference to intent or necessary effect. The intent of every such transaction is obvious; it is to acquire the property and trade that are bought, or, in the lan-

guage of HOLMES, J., in Cincinnati Packet Co. vs. Bay, (200 U. S., 179), "the competition itself" as well as the instruments of competition; but that is not restraint of trade in the sense of the law. And the necessary effect of the transaction is to eliminate the competition bought. Therefore to import the elements of "intent" and "necessary effect" adds nothing to the statement of the transaction itself because they are both present in every such transaction. The truth is that the contention loses sight of the fact that the termination or elimination of competition is not illegal unless it is the result of a transaction in restraint of trade, and such a transaction is not in restraint of trade because there is no agreement restricting the activities of either party. The contradiction and confusion of terms which results from seeking to apply the first section of the Act to acquisitions and purchases because they eliminate competition is sufficient to show that it is forcing it out of its natural channel.

IV.

The transfer to, and acquisition by, the Standard Oil Company of New Jersey of the stocks of the various corporations in the year 1899 was not, and the continued ownership of those shares with the control which it confers is not, a combination or conspiracy in restraint of trade declared to be illegal by the first section of the Sherman Act.

(1) Treating the transaction for the purposes of argument as a combination it was not the bringing together into a single ownership or control of separately and diversely owned concerns, or a transaction that involved any restraint upon the freedom of diverse owners of separate concerns in their control and management.

The situation at that time was that, following upon the dissolution of the so-called trust of 1882, a part of the owners had converted their trust certificates into the corresponding shares of the twenty companies and continued to hold those shares; and the remaining owners converted theirs in connection with the transfer to the Standard Oil Company of New Jersey. Each of the corporations, including the

Standard Oil Company of New Jersey, had the same stockholders, and each stockholder had the same proportionate stock interest in each corporation. The result of the transfer was that the same body of stockholders, instead of electing the directors of twenty corporations elected only the directors of the Standard Oil Company of New Jersey, who in turn elected the directors of the other corporations.

There is not in this transaction even the remotest analogy or resemblance to a combination in restraint of trade. The different properties and interests were not independent and competitive because of the common ownership. They were not operated and managed as if separately and diversely owned, but as constituent elements of a single business organism. There was no elimination of competition, because all being in the same common ownership they were not and could not conceivably be competitive. There was no restraint of the rights of stockholders of separate corporations, because all the corporations had the same stockholders having the same interest in each. The same body of stockholders exercised directly or indirectly the same

control either way. To treat the transaction as in restraint of trade is to ignore the fundamental and essential element of a transaction in restraint of trade. An illustration may make this position clearer.

A mannfacturing business is established in the State of New York. It is successful, and to increase its output and sell it advantageously auxiliary plants are established, one say in the middle west, one in the northwest, one in the southwest, one in the south, and one in California. In each instance a corporation is organized for that purpose in the State where the plant is located. Two or three marketing companies are organized in different States, each to cover a considerable territory. The capital for these auxiliary establishments is furnished by the original company on behalf of its stockholders or by its stockholders in the proportion of their interests. The stocks of the subsidiary companies are held for those stockholders by trustees, or are issued direct to them in the proportion of their stock interests in the original company. Would the transfer of the stocks by the trustees, or by the individual stockholders, to the parent company for its stock be a combination in restraint of

trade? If the subsidiary companies had been organized by the parent company out of its capital and their stocks had been issued to it, would it be a holding company and as such a combination in restraint of trade? There would seem to be only one answer to these questions; and it would be the same answer if, in one or more of the localities, instead of building new plants existing plants had been acquired by purchase for cash or with the stock of the parent company. These would not be combinations in restraint of trade because the common ownership places the transaction in an entirely different category from that of combinations of separately owned concerns through an agreement or device which restricts the freedom of the owners of each in the control and management of its affairs.

(2) *The situation is the same in substance as it would have been if the Standard Oil Company of Ohio had possessed the corporate authority to acquire the stocks of the other corporations (which is an authority that has become common because necessary in the carrying on of certain kinds of business in several States), and had acquired them itself, and had taken the stocks of the new corporations organized in connection with the expansion of the*

business. Had this been the course of the transactions the trusts of 1879, 1882 and the transfer of the stocks of the subsidiary companies in 1899 to the Standard Oil Company of New Jersey would have been unnecessary. The difference in the two situations is one of form rather than substance, because in both cases there would be the same ultimate body of beneficial owners throughout, the legal ownership or title in the one case being in the Standard Oil Company of Ohio, whilst in the other it was first in the trustees aud then in the Standard Oil Company of New Jersey. Nothing more was effected by the acquisition of the stocks by the Standard Oil Company of New Jersey in 1899 than would have been effected if they had been acquired in the outset by the Standard Oil Company of Ohio. Hence the trusts and the acquisition by the Standard Oil Company of New Jersey are not matters of essence so far as the Sherman Act is concerned. The relation of the transactions with respect to any claim of restraint of trade or monopolizing would be the same in the one case as the other.

(3) These considerations differentiate the Northern Securities case, 193 U. S., 197, which the Court below treated as an absolutely

controlling authority. The Northern Pacific and Great Northern Railroad Companies were competitive trans-continental railroads, *each with its own stockholders* and board of directors. The property of each was "interstate in its character and the operation thereof was interstate." (COCHRAN, J., Bigelow vs. Calumet Mining Co., 167 Fed., 739). Neither Company had the legal power or authority to acquire the other; in fact, such an acquisition was prohibited. They were also prohibited from consolidating or merging. Each was a quasi-public corporation and bound by law to maintain its separate and independent existence. To bring them under what would be practically a common control and management certain leading stockholders of both Companies combined together to organize the Northern Securities Company under the laws of the State of New Jersey as a purely holding company to exchange its shares at fixed ratios for the shares of the two companies. Mr. Morgan and his associates were the leading stockholders of the Northern Pacific Company, and Mr. Hill and his associates were the leading stockholders of the Great Northern Company. But for the com-

bination Mr. Morgan and his associates and the other stockholders of the Northern Pacific Company would have continued to control that Company, whilst Mr. Hill and his associates and the other stockholders of the Great Northern Company would have continued to have controlled it. The combination emanated from an agreement between stockholders of the Northern Pacific and stockholders of the Great Northern. An agreement between these two sets of stockholders creating a board of trustees to control and manage both corporations in harmony would have been "equivalent to an agreement between several persons engaged in business to surrender their discretion as to the manner in which they shall conduct their business";—in other words an agreement or combination in restraint of trade. Instead they adopted the device of a purely holding company to attain the same results. This is the view that the majority of this Court took and on which it founded its decision. Mr. Justice HARLAN said (p. 346): "The Securities Company is itself a part of the present combination; its head and front; its trustee." Mr. Justice BREWER said (p. 362): "The transfer of stock to the Securi-

ties Company was a mere incident of the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out." Thus there was a combination of diverse owners of separate and diverse properties, bound by the law of their being as quasi-public corporations invested with public franchises to continue separate, independent, and competitive, creating through the instrumentality of a holding company a common control which would restrict to the point of nullification that obligation and duty of separate control and management and the consequential competitive relations. The principle of that case is not applicable to a group of commercial corporations, acquired or created for the purposes of a common business, under no obligation to compete with each other, all owned by the same stockholders in the same proportions, the stocks of which have been vested by this common body of stockholders in the main corporation of the group merely to substitute a simple form of control and symbol of ownership for an unnecessarily complex form of control and variety of symbols, and without any change in the activities of the various corporations in relation to the common business.

(4) The reasoning of the Court below upon which the ruling that the transfer of the stocks to the Standard Oil Company of New Jersey was a combination in restraint of trade within Section 1 of the Sherman Act was based, to the effect that the various corporations were *potentially* competitive, and the probability of their becoming actually competitive was lessened by the substitution of the ownership of the stocks of the separate companies by that Company for their ownership by three thousand or more stockholders, is an entirely new interpretation of the Act. Potential competition is a term borrowed from economics and means that the field is open to new comers. There may be no actual competition in a trade at a certain time or place; but if the field is open to anyone there is, in the language of economics, potential competition. The theory is that it is potential competition because a man will so conduct his business as to prices, quality and profits as not to invite it. The term as found in the opinion of the Court below is used to express the fact that two corporations engaged in the same business are *naturally* competitive regardless of their origin and ownership. This conclusion must be based on the assumption

that there is a duty to compete; that is, that the relation of competition between them is inferable merely from their existence. But if there is no duty to compete it cannot be said that competition is their natural relation simply because they exist. The assumption of the Court's reasoning is unwarranted because whether the natural relations of two corporations in the same business is a competitive one depends upon their origin and ownership. If the same body of men create several corporations to carry on a large business for the economical advantages of location or for any other reason, and the stocks of these corporations are all in a common ownership, it is a pure fiction to say that thev are potentially competitive or that their natural relation is one of competition.

Hence in view of the common ownership of the Standard Oil corporations to speak of them as naturally or potentially competitive is to disregard the facts and to assume that there is a duty of competition which there is not in the case of commercial corporations.

(5) Starting with this idea of potential competition the next step in the reasoning is that

if the three thousand or so stockholders had continued to own separately the stocks of the separate corporations the probability of their dispersal and severance would be greater than if vested in one company, so that in time there might be diverse ownership and as a result competition between the separate companies. To treat the diminution of such a probability as restraint of trade is the entirely new interpretation of the Act. *Under that interpretation it becomes an act limiting the powers of common owners of non-competitive properties for the purpose of coercing separate ownership that competition may be brought into existence.* A transaction which makes the joint ownership of the properties of a single business, and therefore non-competitive, more convenient, effective, reliable and permanent is condemned because its tendency is to obstruct its disintegration into diverse ownerships of the various corporations, and thereby possibly bring competition between them into play. An Act to prevent combinations in restraint of trade that competition may be preserved between separately owned concerns is thus turned into an Act to create competition by placing such

restrictions upon joint ownership as will tend to disintegrate it. It is conceivable that legislation might be enacted to accomplish such a result, but it is quite clear that an Act merely denouncing contracts, combination and conspiracies in restraint of trade is not such an Act, and there is nothing in the cases that have been decided by this Court under the Act even suggesting such an interpretation as possible.

(6) The Court based its decision entirely on the transfer of the shares of the subsidiary Companies to the Standard Oil Company of New Jersey in the year 1899 as an illegal combination within Section 1 of the Act. The Court refers to the acts and transactions prior to the enactment of the Sherman Act on July 2d, 1890, but merely as evidence of the purpose of the Defendants with respect to the transactions of 1899. What it says is that "the acts of the defendants and the effect of their transactions in the conduct of the oil trade prior to July 2d, 1890, which if done thereafter would have constituted a violation of the law of that date are competent and material evidence of the dominant purpose and the probable effect of their similar transactions in that business since that

date and for that purpose they may be considered" (Vol. A, 577). These prior acts are the acquisitions prior to 1879, the vesting of the legal title to them in Vilas, Keith & Chester as trustees in that year and later in the trustees of the trust of 1882, and the method of distribution adopted on the dissolution of that trust in 1892, all of which acts are attributed to the seven individual Defendants. It is said that the acquisitions prior to 1879 were a *suppression* of the competition between the concerns that were purchased and acquired; that the object and effect of the trusts of 1879 and 1882 and the method of distributing the stocks on the dissolution of the trust in 1892 was to preserve the common control and prevent the separate companies from competing with each other; and that therefore a similar object and effect are to be attributed to the transaction of 1899.

(*a*) It is true that John D. Rockefeller, William Rockefeller and Henry M. Flagler were the active men in the Standard Oil Company of Ohio at the time of its organization in 1870; and that Oliver H. Payne became interested in the Company as an active man in 1871 or 1872; Henry H. Rogers in 1874, and John D. Archbold in

1875. The remaining member of the seven, Charles M. Pratt, is evidently mistaken for his father, Charles Pratt, who died many years ago. But the relation of these individuals was only that of being the most active men in a circle of stockholders in the management of the properties and no more. For many years their ownership has been a minority interest, as it is to-day. In 1899 they were only seven out of more than three thousand stockholders holding little more than a third of the common stock. In the period prior to 1882 they were officers and directors of the Standard Oil Company of Ohio and what they did was for that Company and its stockholders. Afterwards they were trustees of the trust and directors of the Standard Oil Company of New Jersey, and acted only in those capacities. They were associated only in those relations, and were not otherwise a combination of individuals, or at any time acting as a body with purposes and interests exclusively their own.

(*b*) The acquisitions prior to 1882 have been described. In some instances they were competitive concerns; in others not. As each was purchased for the same body of common owners they ceased to be competitive. The purchases were

perfectly lawful, and the effect upon competition was merely incidental Had these transactions taken place after the passage of the Sherman Act they would not have been within the first section of the Act because they were not contracts, combinations or conspiracies in restraint of trade. Whatever elimination of competition resulted from the acquisitions was not the *suppression* of competition as something sinister or illegal.

(*c*) The purpose of the trust of 1879 was to bring the scattered legal titles to the joint properties then vested in various individuals into a single trusteeship. This was followed by the mature measure of 1882, the purpose of which was to provide a practicable trusteeship to hold the legal title to the joint properties, an effective executive management of the properties and business of the common owners, and a maketable symbol or evidence of the interest of each owner. It was evidently not its purpose to prevent the concerns held in the joint ownership from competing with each other.

(*d*) The dissolution of 1892 resulted from the decision in the case of State vs. Standard Oil Company. (49 Ohio St., 137). That was

a *quo warranto* proceeding to oust the Standard Oil Company of Ohio from its corporate privileges on the ground that it had abused its corporate franchises by becoming a party to the trust agreement of 1882, thereby abdicating its function of self-government, it being held that the act of all the stockholders of the Company in signing the trust agreement was the act of the corporation. That was the only issue raised by the pleadings and the case was heard on the pleadings,—on the amended petition, answer and demurrer to the answer. There was no issue of monopoly, or tendency to monopoly, or restraint of trade, or suppression of competition, or of illegality on any such ground, in the case. There were no facts alleged on which any such issue could be made, heard or decided. There were no allegations respecting the business or relations of the parties to the trust agreements or their ownership, or their operations. The single question raised was that the Standard Oil Company of Ohio was virtually a party to the trust agreement, and that the act of becoming a party to it was *ultra vires* and a ground for the forfeiture of its charter. It is true that the original petition did allege that the

trust agreement enabled the parties to monopolize the oil business; but on the filing of an answer denying those allegations and putting the State to its proof an amended petition was served which dropped the allegations and presented the *ultra vires* character of the act of the Standard Oil Company of Ohio in becoming a party to the trust agreement as the only issue. (The pleadings and proceedings in that case are found in Volume 22 of the Record, pages 2 to 52). The judgment of the Court was simply that "the said corporation has, as alleged in the petition, exercised the power, franchise and privilege of executing and performing the agreements set forth in the petition contrary to and without the authority of the laws of the State of Ohio and in violation of the law of its incorporation; wherefore it is ordered, adjudged and decreed that the said corporation be and the same is hereby ousted from the power, franchise and privilege of making or entering into such agreements or from performing the same directly or indirectly, etc., etc." (Vol. 22, pp. 31, 32). Hence, all that was said in the opinion of the Court about monopoly was said with respect to a matter concerning which there was not a syllable in

the pleadings or a particle of evidence, or any basis whatsoever for its proper consideration and determination. But the result of the decision was that the Standard Oil Company of Ohio had to withdraw from the trust agreement, and that rendered it impracticable as a measure for the future holding and control of the joint properties.

The only feasible plan of distribution consequent upon the dissolution of the trust was adopted. There was an assignment to each owner of his proportionate interest in all the companies. It was utterly impracticable to sever the ownership in the sense of partitioning the properties, because all being parts of a common business there was no basis for separate valuations. It was not feasible to give each owner a separate assignment of his interest in each of the corporations, because the shares or fractions of shares into which it was convertible would have been unmarketable and valueless to him. No one could sell a share or a fraction of a share in any of these separate companies excepting at a great sacrifice and to a large holder who was seeking to increase his holdings, because the value of each depended upon its relation to the other companies. The value of the interest of every owner was

dependent upon its being kept together as an entirety, and it was for that obvious reason that it was covered by a single assignment convertible into the actual shares of the corporations by a single act. There was nothing sinister in this method. On the contrary had the method of separate assignments, or the convertibility of a single assignment piecemeal, been adopted it could only have worked to the advantage of the large over the small holders. It could make no difference to the large holders which method was pursued so far as the control of the companies was concerned, because they converted their assignments and held more than a majority of the shares of each of the companies. The method adopted was one to conserve the interests of the small holders and not at all for the purpose of control.

(*e*) The purpose and effect of the transaction of 1899 are so clear and apparent that it is difficult to see how they need for their revelation the reflected light of past transactions. There was a body of joint owners, some holding their interests in the form of the shares in the respective companies, and others in the form of the trustees' certificates or the trustees' assignments

representing their proportions of such shares. The former were mainly the large holders; the latter the large class of small ones. The Standard Oil Company of New Jersey was the main corporation in the common ownership. By the transfer to that Company the common ownership was simplified, the unity of the business preserved, and a convenient and marketable symbol or evidence of each interest obtained. It was practically an incorporation of the entire business by the common owners through the ownership of the Standard Oil Company of New Jersey. That was the plain purpose, object and effect of the transaction. To attribute to it as its purpose the prevention of competition between the members of the joint ownership is to import into it a a consideration which the situation did not at all suggest. No one dreamed of such a possible competition or of making provision to prevent it.

The decree cannot be sustained on the ground that the Standard Oil Company of New Jersey, and its stockholdings through the transaction of 1899, was and is a combination or conspiracy in restraint of interests or foreign commerce either taken alone or in connection with previous acts and transactions.

V.

Monopolizing is the exclusion of others from a trade by illegal means.

(1) Section 2 of the Sherman Act is as follows :

> **"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."**

In our view it is this section which deals directly with monopolizing. The first section has no application unless there is a contract, combination or conspiracy in restraint of trade, according to their proper definition, directly involved. There may be a contract, combination or conspiracy in restraint of trade without monopolizing or an attempt to monopolize. The combination in the traffic association cases had no relation to monopolizing though in restraint of trade, nor had the conspiracy in Loewe vs. Lawlor. Monop-

olizing is quite different from a contract, combination or conspiracy in restraint of trade though they may be employed as agencies of monopolizing. As it is the first section of the Act which deals directly with contracts, combinations and conspiracies in restraint of trade, so it is the second section of the Act which deals directly with monopolizing, either actual or attempted. Monopolizing does not enlarge the operation of the first section, nor does its absence restrict its operation. Hence when we are dealing with monopolizing we are dealing with the second section of the Act.

(2) Reading the two sections together one marked difference stands out. The first section deals with entities,—a contract, a combination, a conspiracy, and the entities themselves are expressly declared to be illegal, and may be annulled or destroyed. The second section deals with a course of conduct, and whoever pursues that course of conduct, whether alone or in conjunction with others, is declared to be guilty of a crime. It does not declare any particular entity to be illegal. There is no noun used such as "monopoly" or "combination" to make

the section operative upon a specific entity. It reads that if a person shall do so and so he shall be guilty of a crime. It is doing what is made a crime that constitutes a violation of the law. Thou shalt not monopolize, or attempt to monopolize, or combine with others to monopolize; that is the statutory command. Therefore, to determine whether it has been violated, the one, and only, inquiry is whether the forbidden acts have been done. What, then, are the forbidden acts or conduct?

(3) There has as yet been no authoritative definition of monopolizing by this Court. It has been prominent in public discussion in recent years, but without any standard legal definition. It is not uncommon to hear size or aggregated capital in and of itself treated as monopoly. According to that view there is a point at which growth and expansion however legitimate become monopolizing. However convenient that use of the term may be for popular purposes it is not its legal meaning or signification. At common law a monopoly had a precise definition; it was "a license or privilege allowed by the King for the sole buying and selling, making, working or using of anything whatsoever *where-*

by the subject in general is restrained from that liberty of manufacturing or trading which he had before". (Blackstone, Vol. 4, p. 160). FIELD, J., said of them in Butchers' Union Co. vs. Crescent City Co., 111 U. S., p. 756, that "they are void because they interfere with the liberty of the individual to pursue a lawful trade or employment." It is said that in modern legislation and judicial usage it has a broader application than that of an exclusive right based on a grant, and that may be assumed to be true. But monopoly still imports the idea of exclusiveness, and an exclusiveness existing by virtue of a restraint of the liberty of others. With the common law monopoly the restraint resulted from the grant of the exclusive right or privilege. There must be some substitute for the grant as a source of the exclusiveness and restraint essential to monopolizing.

We will not attempt a minute comparison of the various references to the term to be found in many cases. Some of them are obscured by the use of general phrases which are only pertinent when they are related to particular conditions. A concern may by legitimate growth and expansion acquire such a preponderance of a particular trade as to be a dominating factor in that trade,

but it cannot be said to be a monopoly in a legal sense. Therefore "dominating a trade" as a phrase is only applicable in connection with other conditions. The same is true of the phrase "the control of the market," whatever it may mean, because it may be perfectly legitimate under existing conditions for the time being and in certain places. This is also true of the power to fix prices as it is a power which inheres in every producer to the extent of his trade limited only by economic considerations. "Unification of interest or management" may result from entirely legal transactions and does not therefore serve as a definition without necessary qualifications. It follows that these various conditions are not in and of themselves controlling. There must be some element or condition or conduct associated with them which imparts to them the quality of monopolizing in a legal sense. The clew to that element is found in the statement of Judge JACKSON (*In re* Greene, 52 Fed., p. 116) that monopolizing is securing or acquiring "the exclusive right in such trade or commerce *by means which prevent or restrain others from engaging therein.*" Thus the restraint or exclusion of others proceeds, not from an exclusive

privilege conferred by grant, but from the coercion of illegal acts.

What then are those means of exclusion? Certainly not competition because competition is the course of conduct above all most favored. But competition is a state of conflict which necessarily involves a certain amount of extermination. One man may push it to the extreme limits whilst another may draw the boundary line clear inside of them. Price cutting and rebating, collecting information of the trade of competitors, the operation of companies under other names to obviate prejudice or secure an advantage or for whatever reason, are all legal methods of competition whatever moral criticism they may justify. (Pollock on Torts, 8th Ed., p. 152). There is no rule of fairness or reasonableness which regulates competition. The claim that there is assumes, as BOWEN, L. J., said in the Mogul case (L. R. 23 Q. B. D., 615), "that apart from fraud, intimidation, molestation or obstruction of some other personal right *in rem* or *in personam*, there is some natural standard of 'fairness' or 'reasonableness' (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to

go;" to which he adds that "there seems to be no authority and I think with submission that there is no sufficient reason for such a proposition." Lord MORRIS said in the same case that he could see no limit to competition *except the invasion of the legal rights of another.* [1892] App. Cas., 51. Yet competition is one of the principal means whereby one man gets the better of his fellows in the struggle for trade and appropriates to himself an ever increasing share of it, even it may be extending to such a dominating share for the time being as to constitute what is indefinitely called control.

But there are, outside of competition, other means of exclusion. There may be contracts in restraint of trade in the true sense restricting individuals and capital on such a comprehensive scale with respect to a particular business as to be an effective means of exclusion. There may be combinations or conspiracies to exclusively appropriate a trade within the express prohibition of Section 2, of which the combination involved in Swift vs. U. S. (196 U. S., 375) is an illustration; the illegal element lying in the acts being done by a combination for that purpose rather than in the acts them-

selves. There may be fraud, intimidation and other tortious acts, of a systematic rather than sporadic character and operation, and therefore effective as means of exclusion. It is along these lines that we reach the exclusion which is the essence of monopolizing. Hence we submit that monopolizing within the Act is the appropriation of a trade which is the natural effect and result of such contracts, combinations or conspiracies or other unlawful or tortious acts, because thereby "*the subject in general is restrained from that liberty or manufacturing or trading which he had before.*" It is the presence of such means or agencies of exclusion that constitutes monopolizing; and in their absence size, aggregated capital, power, and volume of business, are not monopolizing in a legal sense. It is not therefore a test of monopolizing what properties and plants a concern owns, or how extensive their product is, or how great the volume of its business is in relation to the whole of the business or the business of anybody else, or what power is in the course of trade inherent in that volume of business. The essential thing is are there illegal means used to restrain and exclude others.

(4) If we are correct in our view the position of the Appellee—that if plants are acquired or created to such an extent as in and of themselves without more to establish a control or domination of a trade, or confer the power of such control and domination (which means, we assume, a great and preponderating volume of the trade), monopolizing or an attempt to monopolize or a combination to monopolize is established—is untenable. If such a condition exists without the exclusion of others by illegal means it is not monopolizing, actual or attempted, either by an individual or a corporation. What constitutes a combination or conspiracy to monopolize—and Section 2 of the Act itself expressly deals with combinations and conspiracies to monopolize—is illustrated by the Swift case, which was a combination of corporations, firms and individuals separately and independently engaged in a business, together controlling nearly the whole of it, to monopolize it by certain acts and courses of conduct effective to that end when done and pursued by such a combination. That is quite different from the stockholders of a corporation, owning and operating plants of its own, acquiring the plants of competitors or creating new plants

to extend their trade, though acquired and created for that purpose, when there is no unlawful exclusion of the energies and capital of others from the trade. There is no element of monopolizing in such acquisitions and creations in and of themselves and in the amount of the business which they enable the owners to do. Monopolizing could only enter in through the illegal exclusion of others.

(5) Attention is called to certain cases in this connection which, even if they are applicable to the question as it arises under the Sherman Act, are clearly distinguishable. These cases are Richardson vs. Buhl, 77 Mich., 632; People vs. North River Sugar Refining Co., 54 Hun, 354; State vs. Standard Oil Co., 49 Ohio St., 137; State vs. Distillery Co., 29 Neb., 700; Distilling Co. vs. People, 156 Ill., 448, and Anderson vs. Shawnee Compress Co., 209 U. S., 423.

Of these cases People vs. North River Sugar Refining Co. (54 Hun, 354), and State vs. Distillery Co. (29 Neb., 700) need no comment, because they involved combinations of separately owned concerns for the management of their business as a whole by an outside body of trustees, and which were, therefore, in restraint of trade

according to its legal definition. State vs. Standard Oil Co. (46 Ohio St., 137) need not be considered for the reason that the issue of monopoly was not involved in the case, as we have shown, and the Court treated the combination as an industrial trust pure and simple, which, as we have also shown, it was not.

Richardson vs. Buhl (77 Mich., 632) was an action to recover money paid to the defendants under a contract. The suit grew out of transactions connected with the organization of the Diamond Match Company. It appeared that the object of the corporation was to buy up the property of all individuals or corporations engaged in the manufacture of friction matches, exacting from the manufacturer in every case a bond that he or it would not for a term of years engage in, or aid any one else in, the manufacture of matches in any place where such action might conflict with the interests, or diminish the sales or lessen the profits, of the Company. The Company was not a party to the action; the issue of monopoly was not raised by the pleadings; and it was not discussed by counsel. It was brought into the case by the Court itself, which held under these

circumstances that the Company was a monopoly (seemingly without regard to any exclusion of others from the trade excepting as that appeared from the sweeping bonds which were exacted from the vendors), and refused to enforce the contract because made to further the objects and purposes of the Company. *The only cases cited are those of pure combinations of separate concerns and contracts in restraint of trade;* and the distinction between acquisitions and ownership on the one hand, and executory combinations, leaving the separate ownerships in existence, on the other hand, is not observed or mentioned.

The legality of the combination of separate and independent distillers known as the Whiskey trust having been attacked in the case of the State vs. Nebraska Distillery Company (which finally resulted in a decision adverse to the trust, 29 Neb., 700), the Distilling & Cattle Feeding Company was organized under the laws of the State of Illinois to take over the properties and plants of the members of the trust in exchange for its stock. The Attorney General of the State of Illinois brought *quo warranto* proceedings to oust the corporation from the right to exercise its franchises in Illinois because the

corporation was a monopoly. The contention of the Attorney General was sustained, the Court holding that as the preexisting trust was a monopolistic combination the organization of the defendant corporation to acquire the plants of the parties to the trust in exchange for its stock, as the result of an agreement among them that the corporation should be organized for that purpose, did not purge the combination of its illegality. (156 Ill., 448). The only cases cited were again cases of combinations of separate concerns in restraint of trade, excepting one which involved the acquisition of the stocks of certain quasi-public corporations by another corporation, and therefore presented an entirely different question. The Court entirely failed to observe the distinction between a combination of independent manufacturing or trading concerns, each continuing its separate ownership but restricted in its power of control and management, and the ownership of the new corporation with its own stockholders and an unrestricted freedom in the conduct of its business; and it cites no authority for treating that ownership as subject to the same rule of public policy as the combination. The view which seemed to control the Court was that the corporation and the transfers

to it in a mass were a mere form or device for the continuance of the illegal combination *as such.* Though the case at bar presents an entirely different state of facts, and one so different as to remove it from the principle of the two cases last cited and the other cases in Illinois and one or two cases in other states which have followed them, we do not admit their soundness, and find ample justification for not doing so in the principle of such cases as *In re* Greene (52 Fed., 104; JACKSON, J.); Trenton Potteries Company vs. Oliphant (58 N. J. Eq., 507); Oakdale Co. vs. Garst (18 R. I., 484); State vs. Continental Tobacco Co. (177 Mo., 1); Diamond Match Co. vs. Roeber (106 N. Y., 473); Davis vs. Booth & Co. (131 Fed., 31); Robinson vs. Brick Co. (127 Fed., 804).

The foundation stone of our contention is that the acquisition of existing plants or properties however extensive, though made to obtain their trade and eliminate their competition, is not a monopoly at common law or monopolizing under the Sherman Act, in the absence of the exclusion of others from the trade by conspiracies to that end or contracts in restraint of trade on an elaborate and effective scale, or other systematic, wrongful, tortious or illegal acts; and that when such monopolizing is present the

remedy of the Act is to prohibit the offending conspiracies, contracts, and illegal acts or means of exclusion, leaving the individual or corporation to pursue his or its business with the properties and plants that have been acquired or created shorn of the monopolizing elements in the conduct of the business.

This position is not in any way in conflict with the decision in Shawnee Compress Co. vs. Anderson, 209 U. S., 423. That was an action by a stockholder of the Shawnee Company attacking the validity of a lease made by the Company, on the ground among others that the lessee was a combination in restraint of trade in violation of the Federal anti-trust law and the anti-trust law of the Territory of Oklahoma, and that the lease was in aid of its operations as a combination. The lease contained a provision that the lessor Company would not "directly or indirectly engage in the compressing of cotton within fifty miles of any plant operated by the" lessee Company, and the lessor Company further "agrees and pledges" to the lessee "its good will, moral and legal support, and that it individually and collectively will render the Gulf Company every assistance in discouraging un-

reasonable and unnecessary competition." This covenant was unquestionably in restraint of trade because its restraint was greater than the protection of the lessee required in connection with the leased premises, and that was a sufficient basis for the decision. It is true that the Territorial Court, on all the evidence and facts in the case, covering not only purchases and leases of numerous plants, but the restrictive covenant, the close relations of the lessee Company's plants to the Atlanta Company's plants, the latter Company being owned by railroad companies, and differences in railroad rates fixed with the evident purpose of discriminating in favor of these closely-related Compress Companies as against independent companies, found that the enterprise in which the lessee Company was engaged was an unlawful one as conducted, and that the contract in question being made to further its objects and purposes was void on the ground that it was in unreasonable restraint of trade and against public policy; and that this Court said that the case presented "acts in aid of a scheme of monopoly"; but we insist that this was not a ruling, in view of the facts on which it was based, that acquisitions of property can consti-

tute monopoly or monopolizing in the absence of unlawful exclusion.

(6) But it is argued that the acquisition of competing plants and properties on a large scale *with the intent to monopolize* is unlawful; and that, though their ownership is not subject to attack, their use may be enjoined, necessitating, therefore a disintegration of the ownership. The fallacy in this argument is that the acquisition of plants and properties does not and cannot exclude anyone from the trade in the absence of a mass of far-reaching restrictive covenants, and therefore, an intent to monopolize cannot be attributed to it. The intent of transactions cannot be broader than their natural consequences; and the consequences of such transactions are an increase of manufacturing capacity, an increase of trade, and the elimination of present competition; but no exclusion of anyone from the trade or prevention of future competition. An intent to monopolize cannot be predicated upon acts and transactions which do not exclude others from the trade. It is arguing in a circle to condemn acquisitions of property because of intent to monopolize and then to deduce the intent from the acquisitions themselves. Hence

transactions cannot, on any theory of intent, be condemned as unlawful for consequences which cannot possibly flow from them, and that is the reason why there is no body of common law authority sanctioning this contention, notwithstanding that monopolies and monopolizing are illegal at common law. England is the home of the common law, and we know of no English case which has held that acquisitions of competing properties on any scale are against public policy by attributing to them an intent to monopolize. Judge Taft did say in the Addyston Pipe case (85 Fed., p. 291) that "in *recent years* even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly". Five of the cases cited are Richardson vs. Buhl (77 Mich., 632), People vs. Refining Co. (54 Hun., 366), State vs. Nebraska Distilling Co. (29 Neb., 700), State vs. Standard Oil Company (49 Ohio St., 137), and Distilling and Cattle Feeding Co. vs. People (156 Ill., 448),

which we have already discussed. The other cases cited are Arnot vs. Coal Co. (68 N. Y., 558), People vs. Milk Exchange (145 N. Y., 267), Manufacturing Co. vs. Klotz (44 Fed., 721), Carbon Co. vs. McMillin (119 N. Y., 46), Harrow Co. vs. Hench (83 Fed., 36), Factor Co. vs. Adler (90 Cal., 110), Lumber Co. vs. Hayes (76 Cal., 387). Of these Arnot vs. Coal Co., Lumber Co. vs. Hayes and Factor Co. vs. Adler were pure combinations of, or contracts between, separate dealers not at all involving the acquisition of competing plants or properties. People vs. Milk Exchange involved a corporation of which the stockholders were milk dealers in the City of New York or milk commission men doing business in that vicinity, who continued their separate business, and its function was to regulate the price at which milk should be purchased by them. Carbon Co. vs. McMillin involved a combination of manufacturers of carbon who entered into a contract whereby they were to continue in the possession and operation of their plants, but to lease them to a common trustee who was to designate the kind of goods to be manufactured, fix the prices at which, and the persons whom, they should

be sold, and after paying expenses divide the net proceeds and profits as provided in the contract. It was this contract which was held to be illegal. Harrow Co. vs. Hench was a contract forming a combination between various manufacturers by which their patents were transferred to a corporation, which in turn licensed each concern to manufacture under its own patents so tranferred, subject to the sale of the product at prices fixed by the corporation. The Court said (83 Fed., 38): "The corporation provided to hold the legal title of the several patents is merely an instrument to effect this object. The prior owners are still the beneficial owners with the right to continue their business subject only to the restraint in its management imposed by the contract." None of these cases involved any real acquisition of property.

In Manufacturing Company vs. Klotz the question arose on an application for the appointment of a receiver and was not a final decision on the facts. The view taken by the Court on this interlocutory application was that the combination of bakeries involved was one by which

> " each bakery when secured (was) to be carried on by its former managers, subject,

however, as to control of funds, territory, prices and competition to the central management; all profits pooled and of course division thereof to be made on the basis of the stock assigned to each bakery" (44 Fed., 724).

We find no doctrine in these cases which has any application to the facts of this case or the particular proposition under consideration. Here we have acquisitions through separate transactions from time to time of various plants and properties more or less competitive, or not at all competitive in some instances, more than thirty years ago as accretions to an existing business; then growth by enlargements and creations; no exclusion at any time of others in connection with either of these processes; and the question is, is there present monopolizing or an attempt to monopolize? It is argued that the acquisitions were unlawful because infected with an intent to monopolize. We have argued that there is no reason or authority for that proposition. But we add that the original Standard Oil Company of Ohio, plus its acquisitions long antedating the Sherman Act, was only the structure in its infancy; that during the past thirty years the structure has

grown by enlargements and new creations indisputably to meet the growth and expansion of the oil trade all over the world as the supply of the raw material and the demand for the manufactured products have increased; and that the taint, if there was any, in the original acquisitions, which we deny, has disappeared with the lapse of time, the transformation they have undergone, and the relative insignificance of the portion of the present structure which it affected. We submit that an Act intended to prevent, with criminal and civil remedies, *present* monopolizing or attempts to monopolize may not be construed to authorize the Court to lay hold on acquisitions so far back, because of an intent that it may associate with them, as a reason for the disintegration of an existing structure of which they are a very minor part, even to the extent that they enter into it. The vital matter is not what took place from thirty to forty years ago; but the conditions when this proceeding to enjoin present violations of the Act was begun.

We do not discuss the question whether the acquisition of practically all of an article in common use *of which the supply is limited by nature* (as distinguished from those articles which are capable of unlimited production by

the application of labor and capital), and the control which would result, would constitute monopolizing, because such a situation is not even suggested by the facts in this case. Combinations of separate concerns to accomplish such a control are condemned by the law, but there is no case extending that condemnation to ownership by acquisition. It might be argued that the element of exclusion of others would be involved under those circumstances and to such an extent that the intent to exclude, and therefore monopolize, might be inferred from the *nature of the property acquired* unless other facts could be produced to negative it. It could be answered to that argument that the law has not so far placed any limitations on the right of acquisition, and that until there is legislation to that effect a man is not restricted in what he may acquire and what he may do with what he owns. This question is not, however, presented by this case and is not likely to arise, and a hypothetical solution of it would serve no useful purpose.

To sum up the argument of Point III. and this Point in which we have endeavored to con-

strue and apply the substantive provisions of the Sherman Act as a whole:

The first section deals with contracts and combinations which by executory agreements restrict the freedom of contractors in the carrying on of their trade in their own way, and with combinations and conspiracies to restrict the freedom of others in the conduct of their trade, and which are therefore contracts, combinations and conspiracies in restraint of trade. It declares illegal every such contract, combination and conspiracy and sweeps within its condemnation not only such contracts and conspiracies, but every industrial trust composed of separately owned and independent concerns, and every trade agreement between competitive concerns whether reasonable or unreasonable according to PECKHAM, J., in the Trans-Missouri case, but only if unreasonable according to BREWER, J., in his opinion in the Northern Securities case. This gives the first section a tremendous operation.

The second section deals directly with monopolizing, attempts to monopolize and combinations to monopolize. It is not concerned with acquisitions of property, or size, or aggregated

capital, or the structure of the business of an individual or a corporation, but denounces as criminal the acts and conduct of the individual or corporation, alone or in conjunction with others, which illegally excludes others from the trade. This construction gives this section a tremendous operation, but it saves it from being an unnecessary weapon of destruction merely because of unlawful conduct which can be stopped. Supplementing these substantive provisions is the remedial provision of injunction reaching every contract, combination and conspiracy in restraint of trade and every feature of monopolizing conduct, and the remedial provision of treble damages in favor of any party injured by a violation of the Act. With this scope and operation it accomplishes all the purposes for which it was enacted. Had it been intended to limit size, or the aggregation of capital necessary to the conduct of trade on a great scale and a place in the markets of the world, or to destroy business organisms simply because of unlawful conduct, and thus to reconstruct the industrial and commercial system of the country, it would have explicity said so. And to accomplish the purpose we have assigned

to it is about the limit of reasonable legislation. For the rest we have to depend upon the laws of business as the effective and true regulators. The tendency is to overlook them because they lie deeper and are more difficult to grasp than the laws of the statute book. There were some who feared that the doctrine of the Knight case would prove an aid to monopoly; but these fears were groundless. In the few years that have elapsed since its date the American Sugar Refining Company's product has fallen from 98 per cent. of the total consumption to less than 50 per cent. The reason is not far to seek. This is a country overflowing with capital and it unfailingly seeks the industries which afford large returns. So it has been in the sugar industry; so it is in the oil industry right under our eyes; and so it will ever be in every field of industrial and commercial activity. This is an immutable law, and it only requires time to work out its results. For that reason monopoly will always be more of a spectre than a reality. It may seem to exist for a time; but it is only seeming, because in its efforts to establish itself it inevitably draws upon itself the forces of dissolution.

VI.

The Standard Oil Company of New Jersey was not monopolizing, or attempting to monopolize, or combining with anyone else to monopolize, interstate and foreign trade in petroleum and its products when this proceeding was instituted, or at any time.

The Court below having held the transfer of the stocks of the subsidiary corporations to the Standard Oil Company of New Jersey to be a combination in restraint of trade in violation of the first sections of the Act, further held that this combination constituted illegal means whereby a substantial part of interstate and international trade was being, and had been, monopolized in violation of Section 2 of the Act. The petition alleges other means as having been adopted to effect monopolization and a great deal of evidence was taken with respect to them; but the Court said "as the combination to which we have alluded created, maintained and prolonged the monopolization it must be enjoined," and therefore "the question whether or not the charges in the bill that other unlawful means

were or are employed are true, and whether or not the power of the Court to prevent the existence or continuance of a monopoly is limited to the prohibition of the use of illegal means and their like, have become moot, and it is unnecessary to express any opinion upon them" (A, 585). Hence we are before this Court without any findings respecting the other alleged illegal means of monopolization. It follows that if our position under the last preceding point—that there is and has been no contract, combination or conspiracy in restraint of interstate and foreign commerce within Section 1 of the Sherman Act—has been established the only basis of the decision and decree respecting a violation of the second section has disappeared. We might stop with that consideration so far as this decree is concerned. But so much has been said, and will no doubt be said, in the presentation of this case respecting monopoly and monopolization that we feel justified in traveling far enough outside of the actual decision to discuss the question whether there was monopolization, or an attempt to monopolize, or a combination to monopolize when this proceeding was begun in December, 1906, treating monopolization as exclusion by illegal means.

(1) In 1906 when this proceeding was begun the business of the Standard Oil Company of New Jersey, by means of its own instrumentalities and the instrumentalities of the Companies whose stocks it owned, was, and had been for many years, a unit. The Company was not in combination with any other interest engaged in the oil business. It has therefore to be judged by what it itself was doing and had been doing. The sole question is—has *it* by unlawful means excluded others from the trade and thereby substantially appropriated it.

(2) The significant fact of the period of substantial acquisition—1870–1880—is the absence of restrictive agreements in connection with the purchases of plants and properties. Neither then nor at any time since, with possibly one or two trivial exceptions, has there been any exclusion of the capital or energies of others from participation in the business by that means. The whole domain of the business from the production of the crude oil to the marketing of the manufactured products has always been open to everybody.

(3) Since that period the growth and expansion of the business, corresponding with the

growth and expansion of the oil trade as a whole, has been entirely through the building of new works, the enlargement of existing ones, the construction of new pipe lines, and the expansion of markets and marketing facilities. In 1882 the total production of crude oil was about 25,000,000 barrels; the value of the Standard's refineries and manufacturing properties was $17,000,000; its consumption of crude oil was 16,592,593 barrels; its pipe line mileage was 3,531 miles, divided betweeen gathering lines, 2,468 miles, and trunk lines, 1,062 miles; and its marketing stations, consisting of tanks for the storage of oil with tank wagons for its distribution, were only 130 in number. From time to time after 1882 it enlarged its existing works, and built new refineries at Marcus Hook, Pa.; Lima, Ohio; Whiting, Ind.; Sugar Creek, Mo.; Neodesha, Kan., and San Francisco, Cal., so that in 1906 the total value of its refining plants had increased to nearly $58,000,000, and its consumption to 65,000,000 barrels out of a total production of 160,000,000 barrels or thereabouts. It completed its trunk pipe lines to the seaboard at Bayonne, New York, Philadelphia and Baltimore, and built gathering lines for the

Lima-Indiana and Illinois fields with trunk lines to Chicago and Cleveland; for the great Mid-continent field with a trunk line to Griffith, Ind., and for the California field, so that in 1908 its total mileage of pipe lines had increased to 54,616, of which 45,227 were gathering lines and 9,388 were trunk lines. It developed its marketing facilities so that its marketing stations in the United States had increased in the year 1906 to 3,573.

The situation in California may be cited as a striking illustration of this internal expansion. In 1900 the Pacific Coast Oil Company had about 56 acres of land which was supposed to be good for producing purposes; a small refinery at Alameda with a capacity of about 260 barrels of crude oil a day; a small pipe line about 40 miles long running from the oil producing fields to the coast at Ventura about two or three hundred miles from the refinery at Alameda; and a small bulk steamer. The Company's stock and property were purchased by the Standard Oil Company of New Jersey in that year for $760,000, and its name was changed to the Standard Oil Company of California. It then constructed a refinery at Richmond, Cal., upon land newly purchased for

that purpose, which has a capacity of 28,000 to 30,000 barrels of crude oil a day. A pipe line 350 to 400 miles in length was built in the years 1902 and 1903 from the oil fields which had been recently discovered in an entirely different region of California from that tapped by the short pipe line of the Pacific Coast Oil Company. The authorized capital of the Company is now $25,000,000, of which $17,000,000 have been issued, the whole of which has been paid for in cash at par by the Standard Oil Company of New Jersey. In other words, the Standard Oil Company of New Jersey has contributed the original purchase price and $17,000,000 of additional money in the development of the plant and business of that Company in California.

When the Pacific Coast Oil Company was purchased in the year 1900 the total production of crude oil in California was 4,329,950 barrels, and in 1907 it was over 40,000,000 barrels. The crude oil could not in 1900 be refined into a marketable article, and its product was only salable by mixing it with eastern refined oil in the proportion of 30 per cent. of California refined to 70 per cent. of eastern oil. The Standard, through its

chemists, invented a process for the successful refining of the native oil into a merchantable product, and now, through its efforts, all its Pacific Coast trade and a large Oriental trade are supplied with oil manufactured from California crude. Its domestic trade amounted in 1902 to 40,259 barrels and in 1907 to 440,856. The export trade to the Orient was in 1904 when it began, 61,342 barrels, and in 1907, 1,161,162 barrels. It purchased in California in 1902, 3,000,000 out of a total production of 14,000,000; in 1903, 6,000,000 out of a total of 24,000,000; in 1904, 9,500,000 out of a total of 29,700,000; in 1905, 9,500,000 out of a total of 34,000,000; in 1906, 9,500,000 out of a total of 32,500,000, and in 1907, 9,000,000 out of a total of 40,000,000; and its own production was in 1902, 113,778 barrels; in 1903, 91,133; in 1904, 121,994; in 1905, 97,205; in 1906, 59,556; and in 1907, 624,000 barrels.

Another illustration is the history of the Standard Oil Company of Indiana and the Solar Refining Company. The substantial production of the Lima oil field, which is partly in Ohio and partly in Indiana, began in 1886. The crude oil of that field was not

refinable by any known process, excepting a small portion on the northerly fringe of the field in Ohio. It could only be used for fuel, selling as low as 15c. a barrel. Notwithstanding that fact the Standard organized the Buckeye Pipe Line Company to build gathering systems of pipe lines to take the oil as it flowed from the wells, and incurred immense expense in providing tanks for its storage in the faith that it could discover a process by which it could be refined. It took all the oil that was offered, and in 1888 its storage tanks held over 10,000,000 barrels and in 1890 over 20,000,000. It organized the Solar Refining Company and the Standard Oil Company of Indiana and through them constructed the refineries at Lima, Ohio, and Whiting, Indiana, for the refining of this production when a process should have been discovered. Millions of dollars were invested in the purchase and storage of this production and the establishment of these refineries. A successful process for its utilization was in the course of time developed and patented, and the production of the field then became available for manufacture into the various products of petroleum, thus greatly in-

creasing its value to the producers and assuring the success of the refineries which had been built. No other interest has discovered a process for refining the great bulk of the oil from this field, and that it has been utilized for manufacturing purposes is due entirely to the faith, enterprise and energy of the Standard.

The construction of pipe lines, storage tanks, and the refinery at Sugar Creek, Mo., in connection with the Midcontinent oil field after its substantial production in 1901 is another illustration of the same kind.

An instance of the enlargement of the existing plants is furnished by the Bayonne works of the Standard Oil Company of New Jersey, the capacity of which has been so increased that its consumption of crude in 1906 was 13,840,435 barrels, almost equal to the consumption of all the Standard refineries in 1882.

Further illustrations of this expansion are the vast development of the foreign trade in illuminating oil so that in 1906 it was 63 per cent. of the whole Standard production whilst the domestic trade was only 37 per cent. of the whole ; in the utilization of the by-products of the refineries in the manufacture of many useful articles and the

creation and expansion of the demand for them, so that the percentage of by-products of the total consumption of crude oil by the Standard refineries has increased from 39.27 per cent. in 1895 to 52.98 per cent. in 1906, whilst the percentage of refined oil has decreased from 60.73 per cent. in 1895 to 47.02 per cent. in 1906; or, putting it in another way, the production of refined oil had increased in the year 1906 over the year 1895 22.14 per cent. whilst the production of by-products had increased in 1906 over the year 1895, 112.84 per cent.

These are merely illustrations of the normal growth and expansion of the Standard's business and plants with the expansion of the trade as a whole, which has been largely the result of its own efforts and enterprise.

(4) It (speaking of the companies collectively) has never owned or controlled more than a relatively small part of the production of crude oil in the various oil fields. It was not engaged in production at all until the year 1889. Since that time its highest percentage was 33.50 in the year 1898, which has gradually decreased to 11% in the year 1906. The raw material of the trade has always been accessible to any purchaser.

(5) The wide distribution of the oil fields has furnished the amplest opportunity for participation in the business both with respect to the location of refineries and pipe line construction. Oil is produced in considerable quantities in fourteen or fifteen States. Defendant's Exhibit 265 (Vol. 19, p. 624), compiled from a Government publication, shows the locations of the oil fields. Down to 1876 production was confined to Pennsylvania and New York. The Lima-Indiana, Mid-continent, Texas, California and Illinois fields were discovered from time to time in subsequent years. The production of Pennsylvania, New York, West Virginia, Kentucky, Tennessee, Kansas, Indian Territory, Oklahoma and Illinois, though varying in quality, is refinable by the ordinary processes; while most of the production of California, Ohio, Indiana, Texas and Louisiana is refinable by special processes. This is a very different situation from a limited and confined area of production. There has been no obstacle to the establishment of refineries with access to any of the oil fields with or without their own pipe line facilities, or to the employment of capital in the construction of pipe lines by anyone who cared to engage in

the business. This is illustrated by the Gulf Refining Company and the Texas Company which have both established in recent years large refineries in Texas with their own pipe lines to Oklahoma. What they could do there, and what had been done in previous years by the Tidewater system and its associated refineries, by the Pure Oil system and its associated refineries, and by others, anyone else could have done at any time.

(6) The increase in the production of crude oil repels the possibility of coercive exclusion from the trade. The total production had for the first time in 1870, when the Standard Oil Company of Ohio was organized, reached 5,000,000 barrels in any one year. The 10,000,000 barrel mark was reached in the year 1874; the 20,000,000 in 1880; the 30,000,000 permanently in 1889; the 40,000,000 in 1890; the 50,000,000 in 1891; the 60,000,000 in 1896; the 70,000,000 in 1901; the 80,000,000 in 1902; the 100,000,000 in 1903; the 120,000,000 in 1904; the 130,000,000 in 1905; the 170,000,000 in 1907, and the 180,000,000 in 1908.

(7) There have always been numerous refineries in this country owned by other parties and

engaged in the sale of their products in this and in foreign countries (Brief, Vol. 2, pp. 99, 100). They have as a rule been prosperous and growing concerns. As an illustration of that fact it appears that the crude oil receipts of the Producers and Refiners Oil Company, associated with the Pure Oil Company, increased from 1,321,572 barrels in 1900 to 2,771,384 in 1906; that the crude oil delivered by the United States Pipe Line Company, associated with the Pure Oil Company to the refinery of the latter Company at Marcus Hook, which began operations in 1904, increased from 223,000 barrels in that year to 733,000 barrels in 1906; and that the refined oil delivered by the United States Pipe Line Company from interior refineries to Marcus Hook increased from 400,000 barrels in 1901 to 800,000 barrels in 1906. Mr. Tarbell, who is connected with these Companies, testified that their business had been "a growing, developing and expanding business" (Vol. 3, p. 1451), and further as follows (*Id.*, p. 1460):

> "Q. Mr. Tarbell, for a number of years you have lived alongside of the Standard Oil Co., have you not, in many different localities in the transaction of your business?

A. We are in a number of points where they are doing business; yes, sir. Q. At many points? A. Yes, sir. Q. In Europe and in this country? A. Yes, sir. Q. And your business is growing? A. Yes, sir. Q. And you have made money? A. Yes, sir. Q. And you are a prosperous concern? A. Well, I think we are. Q. And you are expanding and developing the whole time? A. It is necessary to do so if we stay in the oil business."

Such instances could be easily multiplied by taking up the independent concerns one by one.

These conditions are utterly inconsistent with the theory of monopolizing. They demonstrate that the field is not only open to competitors but is occupied by them. The extent to which they participate is measured only by their efforts and the capital they employ. It is true that the Standard has done a large percentage of the business, but that is because of its long life, its comprehensive efforts in this country and all over the world, its energy, and the capital it has employed and risked. That percentage has been, however, continually decreasing in later years as others have engaged in the business on a larger, more comprehensive, and more effective scale. What is

true of recent years would have been equally true in past times if the same efforts and capital had been employed by others and the same intelligence shown in adapting those efforts to existing conditions. The percentage of the total business done by the Standard will doubtless continue to decrease, and the causes of that decrease had just the same opportunity of operation in the past as in the present. The volume of the business which any concern obtains for itself is dependent upon its activities and means. That is true of the volume of business that has been done by the Standard and by its competitors. It was the most intelligent, the most active, the most enterprising, the best equipped, and in the highest credit, and the greatest share of the business fell to it. But that is not monopolizing, and that it is not so is demonstrated by the fact that as others have approached it in efficiency, capacity and means they have shared in the business correspondingly, and are constantly sharing in it to a greater and greater extent.

Confirmatory of this view is the following extract from the report of the Commissioner of Corporations on the oil industry of August 5th, 1907, at pages 636, 637:

"Many independent concern have gone a good way in the direction of integration. Thus many of the small refiners of Western Pennsylvania and Ohio are interested in crude-oil production, and supply part of the oil which they refine. A considerable number of them have small pipe lines or any part owners of pipe lines for supplying their refineries with crude. A large proportion of them have facilities for selling their products directly to retail dealers or are interested in marketing concerns which have such facilities. The great majority of the refiners, it is true, have not carried integration nearly so far as the Standard. But some of them, such as the Pure Oil Co., the Gulf Refining Co. (in conjunction with the J. M. Guffey Petroleum Co., which is owned by the same interests), the National Refining Co. of Cleveland, and the Union Oil Co. of California, have developed the system of integration to a degree approaching that of the Standard itself. All of these concerns have pipe lines, refineries and local marketing facilities. All of them carry the elaboration of by-products to substantially the most complete point permitted by the character of the crude which they use. All except the National Refining Co. are large producers of crude oil. All of them own tank cars and all, except the National Refining Co., own tank vessels. Probably none of these concerns manufactures the

accessory materials of refining, packages, etc., to any such extent as the Standard does, but otherwise their system of integration is nearly as complete as that of the Standard. The difference between them and the Standard is rather in the volume of business than in its comprehensiveness."

(8) The volume of its business has not been due to any system of exclusive selling to the trade. There is no evidence that dealers in oil have ever been required to buy exclusively from the Standard, or been placed under any restrictive covenants or arrangements respecting the source of their supply. There has been no effort at any time to control the market by any such means. This formidable weapon has not been used to secure an advantage over competitors, and that such a potent means of exclusion has not been used is the strongest evidence of the absence of monopolistic conduct.

(9) Turning now to the means of monopolization alleged in the petition and eliminating those which are trivial in their nature or without any support in the evidence for the purposes for which they are alleged, they are reduced to three classes: (1) control of pipe lines; (2)

railroad discriminations; and (3) unfair methods of competition. These subjects cannot be appropriately dealt with in this part of the brief, excepting certain phases of the pipe line situation discussed under another Point. They are completely dealt with in Volume 2, and even to summarize them would be mere repetition. We content ourselves with saying in this place that the careful analysis and consideration they have received in that portion of the brief shows that they have not been the means of any illegal exclusion of others from the trade.

(10) It is also charged that the course of prices furnishes evidence tending to show monopolization. That charge is effectively answered in Volume 2 of this Brief (pp.127–137), where it is shown that during the period under examination the Standard's prices rose less than the average rise in general commodities, and that measured by the purchasing value of money they did not rise at all. Moreover, the constant fluctuation in the prices from year to year is the strongest evidence that they were governed by economic conditions and not fixed by arbitrary will. Inferences may not be drawn from prices in favor of monopolization under

these circumstances, and particularly when the other evidence shows that there has been no appropriation of the trade by the illegal exclusion of others.

(11) This is also true respecting the charge that the profits of the Company have been excessive. In the first place the profits have not been excessive considering the nature and hazards of the business; and in the next place if the evidence, apart from profits, shows that there has been no monopolization the profits shown must have another explanation than that of monopolization, which is in this case that it includes every profit from the well to the retail dealer which usually would be distributed between many different agencies from the gathering of the oil at the wells to the sale of the manufactured products to the trade, including its storage, transportation to refineries, the marine transportation of the products, and marketing through jobbers and commission agents.

VII.

The ownership of the pipe lines has not been a means of monopolizing.

The averment of the petition respecting this subject is as follows (A., p. 53):

> "That during said time carriers of oil by pipe line have been and now are common carriers; that the said defendants have refused and failed to perform their duties as common carriers of oil in the following respects, to wit: That the said defendants have always, in and from all of said districts, charged excessive and unreasonable rates for the carriage of crude oil, and rates which were discriminatory as against the competitors of the said Standard Oil Company; that they have refused to furnish equal facilities for the receiving and delivery of oil of independent shippers and refiners by failing to deliver said oil at the stations along their line where the said shippers and refiners desired the said oil to be delivered; that at other times they have refused to transport oil belonging to others than the defendants and their associated companies, and since the month of August, 1906, have refused to transport oil for others except in such large quantities as to completely prevent independent producers and refiners of oil from using their service; and that as the

result of the said practices the said defendants, through their various companies, have become practically the sole purchasers of oil in the said districts, and have monopolized the said commerce in oil; that by reason of such monopoly of crude oil many of the competitors of the Standard Oil Company in the refining thereof have been compelled to buy their crude oil from the Standard Oil Company; that by this means and others the said defendants have been enabled to limit the supply of crude oil manufactured by their competitors, and impose onerous conditions upon said competitors in the purchase, manufacture, and sale of their oil."

The proofs conclusively show that every essential allegation of fact in this paragraph is absolutely unfounded (*post*, Vol. 2, p. 107).

The theory of the Appellee is that the pipe line systems have been acquired and developed to obtain control of the crude production and its transportation, thereby putting both producers and competitive refiners at the mercy of the Standard as to prices, quantity, rates and facilities.

(1) The original acquisition of the small congeries of pipe line interests in 1873 and 1874 was an absolute necessity. Production at that time

was increasing by leaps and bounds and it had to be taken care of. Wherever oil was found wells were sunk everywhere in the vicinity in the struggle of owners and lessees to reach it. If provision was not made either by transportation or storage for the oil as it flowed from the wells it was wasted and lost forever. This involved constant multiplication of gathering pipes to reach the new wells as they were opened wherever they might be; additional pipes to convey the increasing production to railroad points; and the construction of storage tanks for the production over and above the demand. Refineries required a constant and steady supply of the crude, which necessarily depended upon the adequacy of the instrumentalities of supply, consisting of pipes from the mouths of the wells to railroad points and railroad transportation to refining points. The demoralization and inadequacy of the provisions which existed in the early 70's, were acute; and to meet the growing needs of producers and refiners a great deal of capital was necessary as well as energy in construction. That was the problem which confronted the Standard in those days. It met

it in the beginning by acquiring in 1873 its small original interests—the American Transfer Company with its few miles of gathering lines, and its third interest in Vandergrift & Forman's system or systems of gathering lines, known then or later as the United Pipe Lines. The oil field was rapidly extending in different directions in Pennsylvania and into New York, and it found the capital to build promptly the necessary gathering lines. As the surplus production increased it provided for its storage at an enormous outlay and investment of capital. This appears from the fact that the stored surplus had increased to over thirty millions of barrels in 1882. It was absolutely necessary for it to engage in this work of construction to assure its own current supply and to conserve the surplus production for the future needs of refiners; but others were equally free to do so. It was an open field of venture.

From time to time the Standard acquired small gathering systems which had been constructed by others who were without the capital to extend them or provide the necessary storage facilities, and who constantly found part of their plant going out of use with the stoppage of wells. Its acquisition

of the gathering pipes of the Pennsylvania Railroad Company's ally, the Empire Transportation Company, on its retirement from the refining business in 1877 was a special transaction (*post*, Vol. 2, p. 24). *But these acquisitions altogether did not exceed seven hundred and fifty miles of gathering lines and the Columbia Conduit Company's line to Pittsburg between forty and forty-eight miles in length, and they were all situated in the State of Pennsylvania and doing a purely local business.* The lines so constructed and acquired were vested in the National Transit Company whose special charter was acquired for that purpose in 1881.

Another problem of this period was the transportation of the crude oil from the gathering and storage centers in the oil fields to the Standard's refineries at Cleveland, Buffalo and the various points on the Atlantic Seaboard, viz., Philadelphia, Baltimore, New York and Bayonne. Dependence could not be placed upon the railroads because of the constantly increasing volume of the traffic and the need of regularity in the deliveries. To solve this problem the Standard built from 1878 on trunk lines to its refineries at those points. This system of trunk lines was entirely its own creation.

This was the situation in 1882. Of the 2468 miles of its gathering lines at that time all but about 750 miles were its own creation; of its 1062 miles of trunk lines all were its own creation; or all but 40 to 48 miles if the Columbia Conduit's line to Pittsburgh is treated as a trunk line.

The reasons for the developments of later years are equally obvious. The Lima-Indiana field was discovered and oil began to be produced there in great quantities. It was open to all the world. Gathering lines had to be built and storage facilities provided there. That was a very great problem because the production could not be refined by any known process owing to the sulphur it contained. It was not allowed to go to waste. The Standard built gathering systems and provided storage facilities; but in doing so it excluded no one else. Later it built a trunk line from that field with branches to its refineries at Cleveland, Whiting and Lima. These gathering and trunk lines were entirely its own creation for the purposes stated.

Later the great field in Oklahoma and Kansas was discovered, and it too was open to all the world. The Standard built gathering systems of

pipes and storage facilities there, and later a trunk line to Griffith, Indiana, for its Whiting refinery, with branches to its refineries at Sugar Creek, Missouri, and Neodesha, Kansas. The same steps were taken with respect to the Illinois field; and in California it has since 1902 built the necessary pipe line facilities for its refinery there. In this way its total pipe line mileage in 1908 was 54,616 miles, less than 1,400 miles of which had been acquired by purchase after the year 1882, and the lines purchased were entirely in the State of Pennsylvania, with the exception of a few miles of gathering lines running into West Virginia. All the rest was the creation of the Standard through its various companies to save the current production to the fullest extent possible; to supply the increasing demands of its refineries as the production of the earlier fields one after another waned; to conserve the surplus production; and to get its supply to its refineries with the necessary uniformity and regularity.

(2) There has never been any exclusion of any one from the oil fields either in the production of oil, or its purchase, or its storage, or its

gathering or transportation by pipe line. Every one has been free to engage in these operations. The Standard has been on the same plane with every one else. It could not refrain from building gathering systems, storage facilities and trunk lines because others did or did not build them. It was under no prohibition nor was any one else. There have been gathering systems built in every oil field by others; and trunk lines also to the seaboard and interior refining points. They could be as large or small as the parties interested in them determined. If the Lima-Indiana field is an exception it was because of the original refractory nature of the crude; and what would have become of the production and the producers if the Standard had not taken the chances and risks it took when it built the gathering lines and storage facilities there? The Mid-continent field is a perfect illustration of the fact that there is and can be no exclusion of others. The Texas and Gulf Companies built their gathering lines there and trunk lines to their refineries at the Gulf. The gathering and trunk lines of the Texas and Gulf Companies did not exclude the Standard or any-

one else from reaching the Gulf with lines and make them monopolizing lines, any more than the construction of the Standard's gathering lines there and its trunk line to Indiana made them monopolizing lines. The Standard or anyone else was as free to build a line to the Gulf if it desired to do so and as it is doing as the Texas and Gulf Companies. This is true of every oil field.

(3) The Standard's course of business respecting its pipe lines has been the reverse of monopolistic.

Its systems are divisible into two classes, (*a*) public pipe lines and (*b*) private pipe lines. We will take them up separately.

(*a*) *Public Pipe Lines.*

(1) The public pipe lines are those owned and operated by companies which it organized under the corporation laws of States permitting the incorporation of such companies with the power of eminent domain. It was found to be necessary to incorporate such companies in some of the States. The legal status of those companies is that of common carriers. The States under whose laws these

companies are incorporated are New York, Pennsylvania, Ohio, Indiana, Kentucky and West Virginia, and the Standard Companies incorporated under these laws are the New York Transit Company, Northern Pipe Line Company, Southern Pipe Line Company, Southwest Pennsylvania Pipe Lines, Buckeye Pipe Line Company, Cumberland Pipe Line Company, Crescent Pipe Line Company, Eureka Pipe Line Company and Indiana Pipe Line Company. The National Transit Company has a special Pennsylvania charter which was acquired. These Companies all own and operate pipe line systems in their respective States which were constructed and acquired as we have described.

(2) The public pipe lines are divisible into their gathering systems and their trunk lines. Gathering systems with their pipes ramifying from the wells to storage tanks and railroad points are divided into districts. The producer obtains his certificate of the amount which has flowed from his wells into the pipes which he can sell to anyone he sees fit, or not sell. He can retain his oil in the storage tanks free for thirty days, and for any length of time at the rate of twenty-five cents a day per

thousand barrels. The certificate entitles him or his vendee to the delivery of his oil at any railroad or trunk line point in the district. The Standard and other refiners have their purchasing agents in the field who are all on an equality as to buying. There is thus the widest freedom of purchase from the producer and for the operation of competition in the fixing of prices. If the Standard were to disregard the law of supply and demand and give an unduly high price it would, by reason of its being such a large purchaser, impose upon itself an enormous burden and one entirely disproportionate to any benefit that it could receive. If it offered an unduly low price it would not get the oil. The fluctuation in the price of crude oil shown in the chapter on prices (*post*, Vol. 2, pp. 132–134) is the clearest evidence that they are subject to other conditions and influences than the arbitrary will of any interest; and that fact is demonstrated by the experience of the Lima-Indiana field, in which, notwithstanding the Standard purchases the great bulk of the production by reason of having discovered a process by which it can be refined, the general trend of prices has been upwards as the supply diminished.

(3) Experience has developed that the trunk lines, notwithstanding their legal status as common carrier lines, are not, and never have been, used as such. They have never been so used, not because of any exclusion by the Standard Companies, but because of the course the business has taken. What has governed in this regard has been the law of natural tendencies. The trunk lines were built primarily for the supply of the Standard refineries. Other refiners have associated themselves together in providing their own trunk lines for their own use, preferring that relation to one of independence between the refinery and trunk line transportation. Isolated refiners have preferred to buy their crude from the Standard companies or other companies rather than to incur the expense of maintaining buying agencies in the oil fields. Individual refiners on a large scale, recognizing that gathering and trunk line pipe lines are a natural and necessary adjunct of refining on a large scale, have provided their own. The Gulf Refining Company, the Texas Refining Company, the National Refining Company of Cleveland and the Union Oil Company of California are such instances. This has been the natural

evolution of the business, and the result is that no one other than the Standard Companies has ever used, or ever sought to use, its trunk lines.

(4) The pipeage rates consist of the gathering charge of twenty cents per barrel made for the service of the gathering lines, and the rate for trunk line transportation. No objection is raised to the gathering charge. It is almost universal and is the charge fixed by law in West Virginia (Laws of W. Va., 1891, Ch. 44, Sec. 7). No objection is made to the regular storage charge which the producer pays if he prefers to store rather than to sell. No complaint has ever been made by anyone engaged in the trade that the trunk line charges have been excessive, unreasonable or discriminatory. They have not been discriminatory because no one outside of the Standard companies has ever sought to use or used the trunk lines. That others have not done so has not been at all due to the rates because if it had there would have been complaints. An excessive rate could not have been maintained against complaints, because a single suit for the excess of any rate would have settled the matter. More-

over, since the same rates were filed in 1906, pursuant to the provisions of the so-called Hepburn Act of that year, no complaint of any kind has been made to the Inter-state Commerce Commission respecting them by any producer, shipper, refiner or anyone else. It is idle therefore to insist that anyone has been injured, or excluded from the use of the trunk pipe lines, by discriminatory or excessive rates. The indisputable fact is that the trunk lines have not been used for the reasons which we have given.

(5) These Companies have never failed or refused to observe any obligation of their status. They have never refused transportation to anyone. When the so-called Hepburn Act was passed they complied with its provisions by filing with the Interstate Commerce Commission their rates and regulations, and in every other particular. No complaint has been made since that time by any producer, shipper or refiner or any one else to the Interstate Commerce Commission respecting those rates or regulations, or respecting the facilities furnished or the delivery points established It is charged in the petition that the regulations fixing the quantity of oil of any particular kind and quality that must be on

hand for shipment before it will be forwarded is unreasonable, oppressive and excluding. But there has never been any complaint of that nature made either to any of the Companies or to the Commission by or on behalf of any person or interest desiring to use the lines. This would seem to be in and of itself a sufficient answer to this charge. But it is also conclusively refuted by the evidence which shows that the charge was based on a misconstruction or misapprehension of the meaning of these regulations, and that the regulations were necessary and reasonable. The charge as to the rates being excessive or discriminatory is obviously either baseless or of no practical significance, because of the non-user of the lines by others than the Standard companies and the absence of any complaint or objection to the rates. The same answer applies to the charge respecting the omission to provide delivery stations along the trunk lines for so-called independent shippers and refiners. The claim of exorbitant profits from the operation of the trunk lines is equally devoid of practical significance as the rates which have yielded the large paper profits were paid by one set of Stand-

ard companies to another set of them, all in the same common ownership.

(*b*) *Private Pipe Lines.*

(1) These are the systems of the Prairie Oil & Gas Company and the Ohio Oil Company.

The Prairie Oil & Gas Company is a private corporation organized under the laws of the State of Kansas. It was organized in connection with the development of the Mid-continent field. Its business is that of producing, buying and selling oil, mainly buying and selling. It built its pipe lines for the transportation of its own oil in its own business. It has never transported the oil of anybody else or held itself out as a common carrier. It is not organized under an Act authorizing the incorporation of companies as common carriers. It acquired its right of way for its pipes by purchase and its ownership is purely private. It has no exclusive rights of any kind. It excludes no one from the vast production of that field. It is a purchaser in that field the same as any other purchaser. It offers the price it can afford to pay and conducts its business as does any other large buyer. The testimony of the producers in the record is unanimously

in its favor because of the facilities it has furnished for the conservation of the production, and the fact that it has paid the highest prices in the field. It is in no sense, and never has been, either in law or in practice a common carrier.

What has been said of the Prairie Oil and Gas Company is true in every particular of the Ohio Oil Company with respect to the Lima-Indiana and Illinois oil fields. It is purely a private corporation engaged in the business of producing, buying and selling oil; has built its pipe lines on its own right of way, acquired by purchase, for the purpose of transporting its own oil and only its own; has never held itself out as a common carrier; and is not in law or in practice a common carrier. It excludes no one from transacting the same business that it does.

(2) It is complained of these Companies that they have not filed with the Interstate Commerce Commission their tariffs or regulations, and it is argued that they were under a legal obligation to do so by reason of the amendment of 1906 to Section 1 of the Interstate Commerce Act which provides that the Act shall apply to "any corporation . . . engaged in the

transportation of oil . . . by means of pipe lines . . . who shall be considered and held to be common carriers within the meaning and purpose of this Act". (U. S. Comp. Stat. Sup., 1909, p. 1150). We do not deem it necessary to discuss at length the question whether it is within the power of Congress to make the Prairie Oil and Gas Company and Ohio Oil Company, as we have described them, common carriers, or to subject them to the Interstate Commerce Act; or whether, assuming that power to exist, the true construction of the Act brings companies of that character within its operation. It is clear to us that Congress has no such power with respect to those or similar companies that are not required by the law of the States under which they are incorporated to carry oil for others and have never done so; that have never held themselves out or acted as common carriers; and whose transportation of oil has merely been incidental to their business of buying and selling; and further that such corporations are not within the amendment of 1906 persons engaged in the transportation of oil by means of pipe lines as its true meaning confines it to corporations or persons so engaged in that transportation as a

separate and independent business. But, apart from this legal question, the failure to file tariffs and regulations as required by the Act of 1906, which went into force *only a few months* before this proceeding was begun, because these Companies were advised that they were not within the Act, furnishes no evidence that their operations have been an illegal means of exclusion or monopolizing. This is too plain for argument.

On these grounds we insist that the charge that the ownership and control of the pipe lines has been an illegal means of exclusion or monopolizing is without any foundation.

VIII.

The decree erroneously includes and operates upon several of the appellant Companies.

The ban of the decree is placed upon thirty-seven corporations and one co-partnership. They fall into different categories both with respect to the nature of their business and their origin.

We have already under Point II. endeavored to show that the acquisitions of the refining and producing companies were severable from the other acquisitions, and were not within the Act under the ruling in the Knight case, and we shall say no more on that subject. It is on other grounds that this Point is based. The acquisition of the stocks of all of these corporations by the Standard Oil Company of New Jersey in 1899 is condemned as an illegal combination because they were potentially competitive, and the transfer tended to prevent that competition becoming actual through the possible disintegration of the common ownership which previously existed. The contention under this point is that this theory is radically inapplicable to some of the Companies on special grounds existing as to them; and that on no theory is the ownership of their stocks by the Standard Oil Company of New Jersey within the Sherman Act. The Appellants not mentioned under this Point are covered by Points III. and IV.

(1) The Standard Oil Company of Indiana, Standard Oil Company of Kansas, Solar Refining Company and Anglo-American Oil Company

should not have been included for the following additional reasons:

(*a*) The Standard Oil Company of Indiana was organized in the year 1889 to construct a refinery at Whiting, Indiana, in connection with the production of oil in the Lima-Indiana field. Its capital was furnished by the trustees of the common owners and its entire stock was taken by the trustees for their benefit. It built a refinery at Whiting, and later another refinery at Sugar Creek, Missouri. Its business has always been and is the manufacturing of pretroleum products at those points.

(*b*) The Solar Refining Company was organized in 1885 and constructed a refinery at Lima, Ohio, in connection with the production of the Lima-Indiana field. Its capital was furnished, and its stock taken, by the same interests. Its business is and always has been manufacturing of petroleum products at that point.

(*c*) The Standard Oil Company of Kansas was organized in 1892 with a capital stock of $100,000, which was transferred to the Standard Oil Company of New Jersey in 1897. Its capital was increased in the year 1906 by the

addition of $900,000, the whole of which was taken and paid for in cash by the Standard Oil Company of New Jersey. It has constructed a large refinery at Neodesha, Kansas, for manufacturing the products of petroleum from the crude oil of the Mid-continent field, and that is its business.

(*d*) The Anglo-American Oil Company was organized in 1888 by the trustees of the common owners who furnished its capital and took its entire stock for their benefit. It was created exclusively as a selling company in Great Britain, and that is the only business it has ever done. Its competition is in that country with all the other interests which sell oil there. It transacts no business in this country except, perhaps, to buy oil here. It is an instrumentality in a foreign country with respect to the trade of that country, and was created for that purpose only. There is certainly no restraint of the home or foreign trade of this country relieved by a change in the form of its ownership.

(*e*) These four Companies having been created for the common owners there never was any natural relation of competition between them and the other interests of the common owner-

ship. The acquisition and holding of their shares by the Standard Oil Company of New Jersey could not therefore terminate such a relation. It is a plain case of a parent interest creating subsidiary companies for the conduct and enlargement of its manufacturing business or trade, and to introduce the element of competition into such a relation, whether it be called natural or potential, is to resort to a fiction. There is no rational ground for now detaching these companies from the common ownership in which they originated now represented by the Standard Oil Company of New Jersey.

(2) The Standard Oil Company of California, Colonial Oil Company and the Standard Oil Company of Nebraska should not have been included for the following additional reasons:

(*a*) The Standard Oil Company of California (then the Pacific Coast Oil Company) was acquired by the Standard Oil Company of New Jersey *itself* in the year 1900 under the circumstances which have been already narrated. Neither the Standard Oil Company of New Jersey nor any other Standard Company was then, or ever had been, engaged in refining oil

in California or anywhere west of the Rocky Mountains. The Standard Oil Company of New Jersey has since that time furnished that Company $17,000,000 to create the great manufacturing business of that Company as it exists to-day, taking its stock therefor.

(*b*) The Colonial Oil Company was organized by the Standard Oil Company of New Jersey *itself* in the year 1901 to sell oil in certain foreign countries, and its capital was furnished, and its stock taken, by that Company. It sells only in those countries and in competition with other interests there engaged in the business.

(*c*) The Standard Oil Company of Nebraska was organized by the Standard Oil Company of New Jersey *itself* in the year 1906 to sell oil in the State of Nebraska, and that Company furnished its capital and took its capital stock. That is the only business which it has done or is doing.

(*d*) These companies are creations of *the Standard Oil Company of New Jersey* out of its own funds, and the relation between it and them is the relation of a parent company to subsidiary companies of its own creation. That relation

is not in the nature of things a competitive one, natural or potential; and there is no ground for destroying the ownership of the Standard Oil Company of New Jersey of these corporations of its own creation with a view to producing possible competitive relations between them and it, or between each other.

(3) The Chesebrough Manufacturing Company should not have been included in the decree because the stock of that Company which is owned by the Standard Oil Company of New Jersey was acquired by it from the trustees of the common owners years before the transactions of 1899, to wit, in the year 1892. It is and always has been engaged in the manufacture of vaseline,—in which business no Standard Oil Company had ever been engaged. The capital stock of the Company is $500,000, of which a little more than one-half is owned by the Standard Oil Company of New Jersey. No competition is created by compelling the division of its stock among five thousand shareholders at a great sacrifice of its value to them.

(4) The Vacuum Oil Company, Galena Signal Oil Company, Swan & Finch Comprny, Borne-Scrymser Company, Washington Oil Company, Continental Oil Company and Waters Pierce Oil Company should not have been included in the decree for the following additional reasons:

(*a*) The stocks of all of these companies, excepting the Borne-Scrymser Company, held and owned by the Standard Oil Company of New Jersey were acquired from the trustees of the common owners years before the transaction of 1899, to wit, in the year 1892.

(*b*) The Borne-Scrymser Company was organized in the year 1893 by the Standard Oil Company of New Jersey to acquire and take over for cash the property of a co-partnership, known as Borne-Scrymser & Company, engaged in the business of manufacturing lubricating oils; and upon its organization the Standard Oil Company of New Jersey subscribed for and acquired the whole of its capital stock for cash. This was an entirely separate and distinct acquisition of the Standard Oil Company of New Jersey *itself*.

(5) The pipe line companies, including the National Transit Company, should not have

been included in the decree for the following additional reasons:

(*a*) They are all Standard creations out of the funds of the common ownership, excepting the Crescent Pipe Line Company and the Mellen pipe lines; and this is also true of their properties with relatively insignificant exceptions in the case of the National Transit Company only. The Crescent Pipe Line Company, owning a pipe line situated entirely within the State of Pennsylvania, was acquired by the National Transit Company in 1895 through an entirely separate and distinct transaction between these two Pennsylvania corporations duly authorized by the law of that State, the competent authority for that purpose. (L. & N. R. R. vs. Kentucky, 161 U. S., 677).

(*b*) As their sole business is that of transporting crude oil they are adjuncts of the refining business, and are not and could not be in competition with it even if separately owned. They are not competitive with each other because many of them are connecting and not parallel lines; because they constitute in their entirety a single system; and because they were created, with the insignificant exceptions mentioned, by one and the

same interest. There is no ground for breaking this system up into a mass of separate ownerships, which, if they became diverse, would be a paralyzing and destructive operation. The utility and efficiency of the lines is due to their being owned and operated as a single system; and to resolve that system now into separate and diverse elements, which never existed separately, on the theory of converting a potential competition which does not exist into an actual competition which is alien to their nature and the purposes they subserve, is certainly a strange, anomalous and unwarranted application of the Sherman Act. It would be just as reasonable or practicable to break up a great railroad system *created by the same interest* through the means of separate corporations in the different States held together by the stock ownership of the main company.

(*c*) It appears that no refining interest on a considerable scale can be maintained, or would be undertaken, without a pipe line system of its own to provide it with an adequate and regular supply of crude oil. There is no pipe line system to-day, and there never has been one, without its associated refineries, and by associated we mean

ownership interest of the refineries in the pipe line system. The fact is that a pipe line or lines for the supply of the raw material is, owing to the conditions of the business, as much an adjunct of the refinery as its stills or any other interior appliances. All the refining developments of any importance of the last twenty-five years are illustrations. This raises the very serious question whether to detach a pipe line system from its associated refineries so as to put it on an independent basis would not substantially destroy it. All the indications are that it would. It would not obtain the patronage of the refineries that have their own associated pipe line systems. Having to depend upon the patronage of the refineries which have been detached from it, if they to any extent provided facilities for themselves it would mean a corresponding loss of its business. It would have independently to find the capital to reach into various producing fields so that the waning supply of its original fields would be made up by the increasing production of new ones. The Standard's systems in New York and Pennsylvania could not have continued to exist as self-supporting systems if the decreasing production

of the oil fields in those States had not been replaced by the production of the later discovered Lima-Indiana, Illinois and Mid-continent fields reaching them through connecting lines.

There is no experience to show that pipe line systems could ever have maintained an independent existence. If there had been a reasonable probability that they could they would undoubtedly have been built. It is too late now, in view of the established course of the business, to try the experiment. If, pursuant to the decree in this case, the indispensable association of the Standard system with the Standard refineries were dissolved it would cause enormous embarrassment and loss of efficiency without accomplishing diverse ownership, for who would buy the stocks of any of these lines as separate entities considering that they are all at the mercy of refineries free to provide their own pipe lines, and many of them are mere links in a chain and separately of little value? The havoc of such a decree, whether it fails in its purpose through its impracticability or not, is immeasurable.

(6) The Union Tank Line Company should not have been included in the decree because it was organized by the trustees of the common owners simply as a convenient instrumentality for managing the tank cars used for the railroad transportation of oil. That is not a business which would have been brought into existence as a separate and independent enterprise, and it can only exist as an agency of associated or allied refineries. To compel a distribution of its stock among thousand of stockholders is merely to sacrifice its value, and, in the event of the diverse ownership contemplated by the decree arising, to compel the dissolution of the Company. As an independent business it would not continue to exist.

(7) For these reasons we submit that, even if the fundamental theory and finding of the decree could be sustained, its operation upon all of the stocks of other companies owned by the Standard Oil Company of New Jersey without discrimination is far too sweeping; and that the analysis of the origin, relations and purposes of many of the Companies under this Point and Point II. shows that they should not have been included.

IX.

The sixth section of the decree is unwarranted and impracticable in various of its provisions.

As we read this section it prohibits, in the event of the distribution of the stocks of the subsidiary corporations owned by the Standard Oil Company of New Jersey to its shareholders which it indirectly compels, a union of the stock interests of two or more of the separate companies which are potentially competitive; a conveyance of the property or business of one of the companies to another which is potentially competitive; a conveyance of the property or business of two or more of the companies that are potentially competitive to any other of the separate companies; or the bringing together of potentially competitive companies by any similar device; and further, it prohibits any two of the companies from making any express or implied agreement or arrangement with each other "like that adjudged illegal hereby" relative to various matters; among them rates of transportation of petroleum or its products in interstate or international commerce, or the

price or quantity of petroleum or its products purchased or sold. It is true that the first set of these prohibitions is related to the continuance of the combination adjudged to be illegal or "any *like* combination or conspiracy the effect of which is or will be to restrain commerce in petroleum or its products among the States, etc."; and that the second set of prohibitions is limited by the phrase "which will have a like effect in restraint of commerce among the States, etc., to that of the combination the operation of which is hereby enjoined." The illegal combination as found by the Court is the ownership of the stocks of the subsidiary companies by the Standard Oil Company of New Jersey. Thus the Appellants are not only enjoined from continuing this combination, but their future conduct after their separation is regulated in important particulars if they are *potentially competitive*, which as a category is new to the law and as vague as it is new.

This is objectionable on various grounds:

(1) It is not only judicial legislation, but so vague and indefinite as to be a menace rather than a prohibition of specific acts. Certain enumerated acts on the part of individual

corporations are enjoined if they constitute "a like combination" to that declared to be illegal, and if the corporations are "potentially competitive." They are not all potentially competitive, each with each and with the others, because many of them differ so radically in their nature and operations, and some in the same class naturally occupy different territories. In the absence of any definition or classification it will be hazardous and difficult to determine when the relation of potential competition exists between two corporations, and when it does not. Then would the conveyance of its property by one of the companies to another in the same class be "a like combination" to that declared to be illegal? Would the conveyance of the properties and business of two of the separate companies to another of the other separate companies in an entirely different class be such "a like combination"? Would the acquisition of a stock interest in two or three or four of the separate companies by another of the separate companies have that effect? Would an agreement between two of the separate companies respecting rates of transportation of

oil, or the price or quantity of oil bought and sold, be a contract "like that adjudged illegal hereby" or "have a like effect in restraint of commerce among the States," to that of the combination declared to be illegal? Some of the separate companies may find independent existence impossible, and the only available purchaser of their properties or stocks to be one or more of the other separate companies in the same class. Would that be entering into "a like combination" if it should be held that they were potentially competitive? Four or five separate pipe line companies forming a continuous line might have, for their self preservation, to consolidate under the laws of their respective States, or enter into agreements respecting rates of transportation. Would these be agreements or arrangements "like that adjudged illegal hereby," and "having a like effect?" Separate companies like the Standard Oil Company of Indiana and the Standard Oil Company of New Jersey might have to enter into agreements with the Prairie Oil and Gas Company relating to "the price or terms" of their crude supply; or separate refining companies might have to enter into an agreement with the foreign mar-

keting companies for the disposition of their products in those countries. Would such agreements or arrangements be within the ban of the injunction? Are all such transactions to be subject to inquisition under this decree? and if so who can tell in advance with any degree of certainty whether they are within its prohibitions or not!

(2) The individual corporations should not for practical reasons be subject to such far reaching prohibitions. It is an unnecessary restriction of their legitimate freedom. It is quite plain that if the main provisions of the decree be sustained some of the separate corporations could not continue as separate concerns. Their function and existence are so connected with the system as a whole that amputation would be fatal. There are refineries, marketing companies and pipe lines that are and can be utilized as parts of the system that cannot stand alone in the event of diverse and conflicting ownership. They should be free to dispose of their plants and properties to any purchaser. Evidently the separate companies should be free from an overshadowing injunction in the exercise of their corporate powers of consolidation or merger under the laws of their respective

states, in the disposition of their properties, and in the transaction of their business.

(3) We submit, therefore, that this decree goes far beyond the function of a decree in a case of this character; and that having enjoined an existing combination because in violation of the Act, and indirectly compelled a distribution of the stocks held by the Standard Oil Company of New Jersey, it should have stopped there. The separate companies would then be as to their future conduct subject to the law of the land to be administered in the ordinary course. To go beyond that is to legislate by means of an injunction rather than to judically apply the law to an existing state of facts. No one can tell what the exigencies of the future will be. It is not the function of a decree to forecast them, or to enjoin possible future breaches of the law, or to operate as a sweeping command to the parties to obey the law under penalty of punishment for contempt. This is the doctrine of the Swift case (196 U. S., 375); and there are evidently very practical reasons for its application to the case at bar (See, also, New Haven R. R. Co. vs. Int. Com. Com., 200 U. S., 361, 404).

X.

It was error to deny the motion of the Appellants to vacate the order permitting service upon them outside of the Eastern Division of the Eastern District of Missouri, and to set aside the service upon them of the writs of subpœna issued thereunder; and error to overrule the pleas of the Appellants to the jurisdiction of the Court over them.

(1) A writ of subpœna was served on the Waters Pierce Oil Company on November 15, 1906 (Vol. A, p. 172), and on the same day a petition was filed praying for the order for the issue of writs of subpœna against each of the other Defendants. From this petition it appeared that six of the seven individual defendants resided in New York, and the seventh in Florida; that the Standard Oil Company was a New Jersey corporation; and that none of the Defendants except the Waters Pierce Oil Company resided or was to be found in the Eastern Division of the Eastern District of Missouri (A, pp. 174, 175).

The petition in the case contains general allegations that the individual Defendants conspired

with divers other persons and corporations to bring about the transfer of stocks to the Standard Oil Company in 1899 (A, pp. 41, 42). A few other general allegations of conspiracy between the individual Defendants and the various corporations Defendants are to be found in the petition (Vol. A, pp. 49, 61, 97, 103, 109). With the exception of such general allegations the entire petition relates to the acts, the plans and purposes of the individual Defendants. (A, pp. 21, 31–41, 43, 46). The charge of monopolizing is summed up in paragraph XXVII in which it is alleged that by the various means set out, by and through the Standard Oil Trust and the Standard Oil Company, the individual Defendants have monopolized the oil business (A, p. 107). The gist of the petition is that the individual Defendants formerly through the Standard Oil Trust and now through the Standard Oil Company control the other defendant corporations, and have acquired and exercise this control with intent to restrain and monopolize trade. The subsidiary companies are not related to the alleged conspiracy except in that they are controlled by the individual Defendants through the Standard Oil Company. Their acts, in so

far as any specific acts on their part are charged, are connected with the conspiracy through the alleged intent with which the individual Defendants exercise such control. They are not related to each other except through the Standard Oil Company of New Jersey and the petition is concerned with each only in its relation to that Company.

(3) The Waters Pierce Oil Company, the only defendant residing or found within the Eastern Division of the Eastern District of Missouri was one of the subsidiary companies whose relation to the alleged conspiracy differed in no respect from that of any other marketing company whose stock was controlled by the Standard Oil Company of New Jersey.

(*a*) It is named as one of the companies engaged in the petroleum business prior to 1882 (A, p. 10);

(*b*) It is one of the companies named in the trust agreement of 1882 (A, p. 22);

(*c*) It is listed among the companies in which the trustees of the Standard Oil Trust held stock (A, p. 36); and among those in which the Standard Oil Company of New Jersey owns a controlling interest (A, p. 45);

(*d*) It is charged that the Standard Oil Company of New Jersey, through the Galena Signal Oil Company and the Waters Pierce Oil Company has monopolized the trade in railroad lubricating oil. (A, 100–102);

(*e*) It is charged "That for many years last past the Standard Oil Company has owned 2,748 shares out of the 4,000 shares of the capital stock of the Waters Pierce Oil Company * * *; and that during said time there has been and now is an understanding and agreement between the Waters Pierce Oil Company and the Standard Oil Company of Indiana by which the territory of Missouri and other southwestern territory has been divided up" (A, p. 110);

(*f*) The allegations as to jurisdiction are as follows (A, p. 110):

> "Your petitioner further alleges that said individual defendants, through and by means of the said various corporations defendant, are carrying on the business of shipping petroleum and the products thereof into and through the State of Missouri and into and through the Eastern Division of the Eastern District of said State, and selling the same in said various places in said State and in the eastern division of said district, and have been carrying on said combination in restraint of trade in said district, and in the

eastern division thereof and monopolizing the said commerce therein, in the manner and by the devices hereinbefore alleged.

"That the said defendants Standard Oil Company, of Indiana, Republic Oil Company, and Prairie Oil and Gas Company have each heretofore respectively filed certified copies of their articles of incorporation in the office of the Secretary of State of the State of Missouri, and have been duly admitted to do business in said State pursuant to the laws thereof; and that said defendant Waters-Pierce Oil Company has its general office in the city of St. Louis in the Eastern Division of the Eastern District of Missouri."

(4) The Circuit Court sustained the order bringing in the non-resident Defendants upon the ground that upon the allegations of the petition the part played by the Waters Pierce Oil Company in the alleged conspiracy charges it with knowledge of the conspiracy, its scheme, its object and effect, and that the Company was, therefore, a conscious and active party to the entire conspiracy (A, pp. 566–7); and that in proceedings brought under the Sherman Act to restrain an alleged conspiracy in restraint of trade the Petitioner is free to commence suit in any District where a

party alleged to be a conspirator can be found and served with process; and that thereupon the Circuit Court of that District *must* summon before it all parties alleged to be engaged in the conspiracy (A, p. 568).

(5) The *general* allegations in the petition as to the participation of the Waters Pierce Oil Company in the alleged conspiracy are perfunctory conclusions of law. The few allegations relating to its acts make out the Company to be the mere instrument of the individual Defendants acting through the Standard Oil Company of New Jersey. There is no statement in the petition that the Waters Pierce Oil Company or its officers or directors knew of the alleged conspiracy, its scope or plan, or knew the bearing of the acts attributed to the Company upon the plans of the conspirators. The absence of such knowledge is consistent with all the allegations of the petition. The commission of the alleged acts in which it participated is fully accounted for by the direction and control alleged to have been exercised by the individual Defendants. The Circuit Court to sustain its position has found it necessary to infer knowledge on the part of the officers of the Waters Pierce Oil Com-

pany of the plan and scope of the conspiracy, *and upon this unwarranted inference has based its conclusion that the Waters Pierce Oil Company is to be regarded as a participant in the whole length and breadth of the alleged conspiracy.*

This inference, were it justified by the allegations of the petition, would not sustain the position taken by the Court. The same inference or assumption is made as to each of the other subsidiary corporations. As to the great majority of these the bill contains no specific allegations whatever beyond the facts in respect to the ownership of their stock. Upon the allegations of the petition they have no relations with the Waters Pierce Oil Company except through the common control of the Standard Oil Company of New Jersey. But the Circuit Court has treated them as fellow conspirators with the Waters Pierce Oil Company in one common scheme of conspiracy, requiring them in a suit against that Company to appear and defend in respect to their relations to the Standard Oil Company of New Jersey.

(6) It is clear from the petition that the theory of a conspiracy in which the Waters

Pierce Oil Company and the other subsidiary companies were participants was adopted solely for the purpose of haling the Defendants into the selected jurisdiction. When jurisdiction had been obtained the proceeding was prosecuted and adjudication sought in accordance with the true theory of the petition in the case, to wit: that the individual Defendants in causing the stocks of the various subsidiary corporations to be vested in the Standard Oil Company of New Jersey, and the Standard Oil Company of New Jersey in holding such stocks together and exercising control over the subsidiary companies, were offenders against the Sherman Act.

In determining questions of jurisdiction, the Court will look at the real controversy, disregarding allegations which are mere conclusions or inferences from facts specifically pleaded or which patently are inserted only to give color to the claim of jurisdiction. (*Great Southern Fireproof Hotel Co. vs. Jones, 177 U. S., 449; Geer vs. Mathieson Alkali Works, 190 U. S., 428; Wecker vs. National Enameling & Stamping Company, 204 U. S., 176; Lockard vs. St. Louis & San Francisco R. Co., 167 Fed. Rep., 675;*

Gustafson vs. Chicago, Rock Is. & Pacific R. R. Co., 128 Fed. Rep., 85; Arrowsmith vs. Nashville & D. R. Co., 57 Fed. Rep., 165).

(7) The question of the legality of the procedure adopted by the Appellee is reduced to this: The Waters Pierce Oil Company was a proper and perhaps an indispensable party to the cause of action alleged in the petition. Does this fact alone under the law warrant the course of procedure adopted?

(8) The power of Congress to confer jurisdiction on the Circuit Court of any District over parties not residing or found within the District, and to authorize the service of process upon such parties wherever they may be found is not questioned. In exceptional cases this power has been exercised (*United States vs. Union Pacific R. Co., 98 U. S., 569*). Except in so far as special power has been conferred by Congress, the jurisdiction of a Circuit Court is limited to its own District; its process does not run outside of its District; and it has authority only over persons and property found therein, (*Toland vs. Sprague, 12 Pet., 300; Herndon vs. Ridgway, 17 How., 424; Chaffee vs. Haywood,*

20 How., 208; Mississippi & Missouri Railroad Co. vs. Ward, 2 Black, 485; Butterworth vs. Hill, 114 U. S., 128; In re Hohorst, 150 U. S., 653; Clark vs. Wells, 203 U. S., 164; Laborde vs. Ubarri, 214 U. S., 173; United States vs. American Lumber Co., C. C. A., 85 Fed. Rep., 827).

The Sherman Act, in granting to the Circuit Courts all the powers necessary for the proper enforcement of the Act, recognized the general principle that the jurisdiction of each Circuit Court is limited to its own District and limited the power to bring in non-resident parties. That power is made ancillary to the ordinary jurisdiction. It can be exercised only when there is a *pending proceeding*, and then only to the extent that the ends of justice require.

Proceedings are not pending in a Circuit Court unless the defendant in such proceedings is subject to the process of the Court. *Bisbee vs. Evans, et al., 17 Fed. Rep. 474; United States vs. American Lumber Co., 80 Fed. Rep. 309; United States vs. American Lumber Co., 85 Fed. Rep. 827; Herndon vs. Ridgway, 17 How. 424; Laborde vs. Ubarri, 214, U. S. 173.*

A proceeding is pending in a Circuit Court

only in so far as it involves a controversy between the plaintiff and defendants subject to the jurisdiction of the Court. *McHenry & Others vs. N. Y., P. & O. R. Co., 25 Fed. Rep., 65; Berry vs. St. Louis & S. F. R. Co., et al., 118 Fed. Rep., 911; Vattier vs. Hinde, 7 Pet., 252; Osborn vs. Bank of United States, 9 Wheat., 738.*

The ends of justice require the presence of other parties in a proceeding only in so far as their presence is necessary to the full determination of the controversy between the existing parties to the proceeding. *Moser vs. Marsden (1892), 1 Ch., 487; Peck vs. Ward, 3 Duer, 647; Geer vs. Mathieson Alkali Works, 190 U. S., 428; Barney vs. Latham, 103 U. S., 205.*

(9) The petition discloses no controversy between the Petitioner and the Waters Pierce Oil Company for the determination of which the presence of the non-resident Defendants was necessary. The controversy which it does disclose and for the full determination of which all of the defendants are necessary parties, is the controversy between the Petitioner on the one hand and the individual Defendants and the Standard Oil Company of New Jersey on the

other. Only a minor and incidental phase of this controversy could be properly involved in proceedings against the Waters Pierce Oil Company brought in the Eastern Division of the Eastern District of Missouri, to wit: the control of that Company by the Standard Oil Company of New Jersey.

The Petitioner complaining of the conduct of the Waters Pierce Oil Company in restraining or monopolizing trade, might properly have commenced suit against it in the Eastern Division of the Eastern Judicial District of Missouri and might properly have brought in as additional defendants in such suit the Standard Oil Company of New Jersey and any other parties whose presence was necessary for effectual relief against the Waters Pierce Oil Company. But the determination of a controversy between the Petitioner and the Waters Pierce Oil Company cannot involve the relations of the Standard Oil Company to the Anglo-American Oil Company, the South Penn Oil Company, the Standard Oil Company of California, or any of the other defendant corporations whose relation to the Waters Pierce Oil Company consists only in their like relations to the Standard Oil Company of New Jersey.

(10) The petition sets out no separable controversy with the Waters Pierce Oil Company. The filing of the petition did not result in a pending proceeding of which the Court had jurisdiction, and no non-resident parties could properly be brought in.

A plaintiff having a cause of action against two joint tort-feasors makes the controversy inseparable by electing to bring a joint suit. *Louisville & N. R. Co. vs. Wangelin, 132 U. S., 599.*

Therefore, the Petitioner, having a cause of action against the Waters Pierce Oil Company, in which it might properly have brought in the Standard Oil Company of New Jersey has ousted the Circuit Court of the Eastern Division of the Eastern District of Missouri of jurisdiction by setting up a controversy with the individual Defendants and the Standard Oil Company of New Jersey to which its controversy with the Waters Pierce Oil Company is only incidental.

(11) As to each of the non-resident Defendants other than the Standard Oil Company of New Jersey and the individual Defendants, the

motions should have been granted and their pleas to the jurisdiction sustained because none of them was a proper or necessary party to the determination of any issues between the Petitioner and the Waters Pierce Oil Company.

The motions of the individual Defendants and the Standard Oil Company of New Jersey should have been granted and their pleas sustained on the ground that the proceeding was not brought, and cannot be sustained, as one against the Waters Pierce Oil Company, but was a proceeding brought to determine a single inseparable controversy between the Petitioner on the one side and the individual Defendants and the Standard Oil Company on the other, to which the allegations made, and the relief asked, in respect to the Waters Pierce Oil Company were incidental and subsidiary. *Fidelity Ins. Co. vs. Huntington, 117 U. S., 280; Graves vs. Corbin, 132 U. S., 571.*

XI.

The decree should be reversed and vacated.

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